4. Antitrust Class Actions

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Topics

- What is a class action?
- What is the role of class actions in antitrust litigation?
- What criteria must a putative class action satisfy to be certified?
- What requirements for class certification are most vulnerable to attack in putative antitrust class actions?
- What is the role of economic evidence in antitrust class actions?
- What are the mechanics of class action settlements?
- How are class actions financed?

Class actions

- Usual rule for claim preclusion (res judicata)
  - An entity will be bound by a judgment only if the entity —
    - was a party to the action or in privity with a party to the action, *and*
    - was subject to the personal jurisdiction of the court[1]
- Class action exception—
  - permits one or more representative plaintiffs
  - to aggregate in a single lawsuit
  - the claims of similarly situated persons not parties before the court, *and*
  - to bind both the representatives and the represented persons with any resulting judgment (favorable or unfavorable)
- Theory
  - Congruence of interests among the members of the class *and*
  - Adequate representation by the named plaintiff
  - Substitutes for individual control[2]

[1] Hansberry v. Lee, 311 U.S. 32, 40 (1940); Pennoyer v. Neff, 95 U.S. 714 (1878).
[2] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-26 & n.20 (1997); *Hansberry*, 311 U.S. at 41-43.

Public policy for party/privity exception

- Aggregates small claims to provide incentive to litigate[1]
  - Provides a means of aggregating small claims where the individual incentives to litigate are too small to justify individual actions
  - Provides redress for the injured parties who otherwise would not have practical access to the courts
  - Deters wrongdoing by the defendant by internalizing the costs that the wrongdoer imposes on its victims
- Promotes judicial economy[2]
  - Avoids multiple actions on essentially the same claim, so that class members, defendants, and the court all are spared the costs and burdens of multiple actions.
- Protects against conflicts in judicial resolutions
  - Assures that the defendant's obligations, if any, will be consistent across class members

[1] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).
[2] General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982).

Antitrust class actions

- Significance
  - Fixture of modern private antitrust litigation
    - Outside of criminal prosecution, the class action is the antitrust challenge that defendants fear the most
    - Overcomes “small claims” problems, especially in consumer cases
    - Reduces search costs and information asymmetries problems among class members
    - Spreads notoriously high costs of antitrust litigation over multiple claimants
      - Voluminous discovery
      - Economic and industry expert costs
      - Extensive motion practice
    - Once aggregated, the potential recovery is often large enough to attract not only representation but also financing from plaintiffs’ lawyers
  - Promotes dual public purposes of the antitrust laws[1]
    - Provide compensation to those injured by antitrust violations
    - Create “private attorneys general” whose presence will deter future antitrust violations

[1] Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 261 (1972).

Adequacy of representation

- Theory
  - Congruence of interests among the members of the class *and*
  - Adequate representation by the named plaintiff
  - Substitutes for individual control
    - The idea is that–at least in principle–the class representatives would make the same decisions as the absent class members reasonably would have made had they been parties to the action will be made by the named class plaintiffs and class counsel
- Source of requirement
  - Constitutional due process
  - Policy embodied in the law of procedure
  - Inherent discretion of the court in the exercise of the judicial power
- Rules: Class representative—
  1. Must be a member of the class it seeks to represent
  2. Must be a vigorous representative in advocating the interests of the class
  3. Must not have interests that are antagonistic to the interests of other class members

Absent class members

- Bound by class action judgment
  - Receive whatever benefits, if any, resulting from litigation, *but*
  - Precluded from pursuing their individual claims against the defendants in a subsequent lawsuit
- Not parties to litigation
  - Neither parties nor in privity with a named plaintiff by virtue of their class membership
  - *But* may appeal adverse judgment as if a party (without intervening)
- No requirement for personal jurisdiction
  - Need not be subject to the personal jurisdiction of the court in order to be bound by the class action judgment
- Likely to have—
  - No say in the choice of class counsel
  - No individual contact with class counsel notwithstanding an apparent attorney-client relationship between them
  - No input into class counsel's strategy for the litigation, including settlement

Economics of class actions

- Lawyer-financed
  - Antitrust class actions are almost always financed by law firms operating on judicially recognized contingency fee principles
    - The law firms, in turn, can obtain financing from various litigation financing firms
    - Drives antitrust class action litigation almost exclusively to actions that have the potential for substantial damage awards
  - Attractive litigation attributes
    - Factually and legally simple (to reduce costs)
    - Easy to evaluate (to make a return on investment more predictable)
    - High payoff in the event of success (to compensate for risk in financing litigation)

Economics of class actions

- Implications for antitrust class actions
  - Almost always are grounded in simple per se claims
  - Almost always contain a claim of horizontal price-fixing
    - The per se rule applies
    - Proof of liability is among the simplest in antitrust law, *and*
    - Aggregate damages can be enormous even if class members individually sustain only negligible injuries
  - Rarely used to challenge mergers, price discrimination, or non-per se violations (such as non-price vertical restraints)
    - Proof is usually complex
    - Litigation costs are likely to be higher
    - The outcome is less predictable
  - Rarely used in actions where the restraint is something less than industry-wide
    - Split practice complicates proof
    - Limits aggregate damages

FRCP 23

- FRCP 23 governs class actions in federal court
  - 1938—Originally adopted as part of the original FRCP
    - Origin in long-standing equity practice as a device to prevent a multiplicity of suits
    - Because the 1938 revisions also eliminated the distinction between law and equity and created a single civil action, class actions became available in actions for damages as well as equitable relief
    - But technicalities of the rule all but eliminated it in practice
  - 1966—Completely rewritten in essentially modern form
    - Redefined the classes in terms of the nature of the underlying cause of action and the relief sought
    - Clarified the binding effect of resulting judgments whether or not favorable to the class
    - Specified new prerequisites to the maintenance of a class action to ensure adequate representation of the class by the named plaintiffs
    - Provided for certain forms of notice to class members
    - Provided an unusually large role for courts in—
      - The qualification of law suit as a class action
      - The conduct of the litigation
      - In any settlement or dismissal of the class action

FRCP 23

- Purpose of Rule 23:

> The purpose of Rule 23 is "'to select the metho[d] best suited to adjudication of the controversy fairly and efficiently.'" Consequently, class certification is not summary judgment by another name. The plaintiffs' burden is to present enough evidence to warrant adjudication of their claims on a class basis, not to win their case.[1]

- Amendments
  - 1997—Added a new Section 23(f) to provide for permissive interlocutory appeals of class certification decisions
  - 2003—Amended to improve the class action administration
  - 2007—Amended as part of the general restyling of the Civil Rules
    - These changes are intended to be stylistic only
  - 2018—Amended settlement approval process

[1] *In re* Capacitors Antitrust Litig. (No. III), No. 14-CV-03264-JD, 2018 WL 5980139, at *3 (N.D. Cal. Nov. 14, 2018) (quoting Alcantar v. Hobart Serv., 800 F.3d 1047, 1053 (9th Cir. 2015), in turn quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 460 (2013) (alteration in original)).

Initiating a class action

- The class action complaint
  - A plaintiff initiates a class action by filing a complaint with adequate class action allegations:
    - The complaint must allege that it is a class action
      - Typical opening sentence: "[Plaintiff], *on behalf of itself and all others similarly situated*, by its attorneys, brings this action for treble damages and injunctive relief under the antitrust laws of the United States . . . . " (emphasis added)
      - Some local rules require a putative class action to be identified as such in the caption of the complaint or in the title of the pleading
    - The complaint must define the putative class
    - The complaint must allege that the putative class—
      - Satisfies the four requirements of Rule 23(A)—numerosity, commonality, typicality, and adequacy of representation
      - Fits with one of the three categories of class action defined in Rule 23(b)

Initiating a class action

- The class action complaint
  - Testing the sufficiency of the class action allegations on the pleadings
    - Rule 23(d)(1)(D) provides that the court may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly"[1]
      - In addition, Rule 12(f) provides that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."
    - Some courts have entertained a motion on the pleading to strike the class actions in the complaint under Rules 23(d)(1)(D) or 12(f)
      - The courts are split on whether class allegations must be supported by sufficient factual allegations to make it plausible under *Twombly* that the requirements of Rule 23(a) and (b) are satisfied
      - In any event, If the class allegations fail the *Twombly* test, then, as in the usual case, the court should provide the plaintiffs with leave to amend the complaint to cure the deficiency unless it appears that any effort to cure would be futile

[1] Fed. R. Civ. P. 23(d)(1)(d).
[2] *Id*. 12(f).

Initiating a class action

- Interim class counsel and precertification case management
  - Observations
    - Prior to ruling on class certification, the court will enter one or more initial case-management orders to guide the parties in presenting the judge with the information necessary to make the certification decision and permit the orderly and efficient development of the case
    - When multiple class action suits are consolidated before the court in the same matter, the need to coordinate on the plaintiffs' side is especially important to ensure the interests of the putative class(es) are protected, eliminate redundancies in pretrial certification trial practice, and promote judicial efficiency
  - Interim class counsel
    - Rule 23(g)(3) provides for the appointment of interim class counsel to provide any necessary precertification coordination:

> *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.[1]

    - In complex antitrust matters, court will often appoint multiple firms as co-class counsel

[1] Fed. R. Civ. Proc. 23(g)(3).

Rule 23 requirements for a class action

1. Must have a well-defined class that—
2. Satisfies each of four requirements of FRCP 23(a)
   a. Numerosity
   b. Commonality
   c. Typicality
   d. Adequacy of representation
3. PLUS falls into one of the three FRCP 23(b) categories:
   a. Rule 23(b)(1) class
      - Inconsistent adjudications establishing incompatible standards, *or*
      - Adjudications that would be dispositive of the interests of similarly situated persons
   b. Rule 23(b)(2) class for injunctive relief
   c. Rule 23(b)(3) class for damages

1. Well-defined class ("ascertainability")

- Necessary in order to—
  1. Identify those entities that will be bound by any final judgment
  2. Test whether the Rule 23 requirements are satisfied
  3. Provide sufficient notice to absent class members when required
- Requirements
  - Must be sufficiently precise so that an entity's inclusion or exclusion can be ascertained by reference to objective criteria using reasonable effort
  - MCL: Class definition must be "precise, objective, and presently ascertainable"[1]
- Example of a class definition: *Ready-Mix Concrete*

> All individuals, partnerships, corporations, limited liability companies, or other business or legal entities who purchased ready-mixed concrete directly from any of the Defendants or any of their co-conspirators, which was delivered from a facility within the Counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Madison, Marion, Monroe, Morgan, or Shelby in the State of Indiana, at any time from July 1, 2000 through May 25, 2004, but excluding Defendants, their co-conspirators, their respective parents, subsidiaries, and affiliates, and federal, state, and local government entities and political subdivisions.

[1] Manual for Complex Litigation (Fourth) § 21.222. The manual is prepared by the Federal Judicial Center.

1. Well-defined class ("ascertainability")

- Mechanics of defining the class
  - The complaint
    - A named plaintiff seeking to represent a class must allege a class definition and factual allegations sufficient to make plausible that the alleged class satisfies the requirements of Rule 23
    - If amended complaints are filed, the named plaintiff may change the definition of the alleged class
  - The motion for class certification
    - As a matter of practice, the alleged class does not bind the named plaintiff in its motion for class certification
    - Named plaintiffs frequently alter the complaint's class definition—typically narrowing the class—in the class certification motion
      - Indeed, although not common, there are cases in which the plaintiffs narrowed the class definition in their *reply* in support of class certification to obviate objections made by defendants in their class opposition papers[1]
  - Class certification order
    - Must "define the class and the class claims, issues, or defenses"[2]

[1] *See, e.g.*, *In re* Aluminum Warehousing Antitrust Litig., 336 F.R.D. 5, 24 (S.D.N.Y. 2020).
[2] Fed. R. Civ. P. 23(c)(1)(B).

1. Well-defined class ("ascertainability")

- Fail-safe classes
  - *The problem*: Class membership cannot depend on winning the merits
    - Rule 23 requires the class to be defined by objective criteria, not by the legal conclusion the plaintiff seeks to prove
    - A class is not ascertainable if membership cannot be determined without first deciding whether the defendant is liable
  - "Fail-safe" classes
    - *Definition*: *A fail-safe class is one defined so that a person is a member only if that person has a valid claim*
    - *Examples*:
      - "All purchasers injured by defendants' unlawful conspiracy"
      - "All persons overcharged by defendants' illegal conduct"
      - *Compare with*: "All persons who purchased product X from defendants in the United States from [date] to [date]" (not fail-safe—membership determined by objective criteria, not the merits)
  - Why courts object
    - Courts object to fail-safe classes because, if plaintiffs lose, the putative members are defined out of the class and are not bound by the adverse judgment[1]

[1] *See* Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677-78 (7th Cir. 2009).

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - While ascertainability is an implied requirement of Rule 23, most circuits to address the issue reject *administrative feasibility* as a separate part of ascertainability
    - "Administrative feasibility" means that the court must have a *practical* means of identifying whether a given person is a member of the class
    - *Query*:
      - Administrative feasibility in this context appears to address whether there is a practical means of proving membership in the class; ascertainability more generally addresses whether the class is defined by objective criteria.
      - *WDC*: Objective criteria is necessary to ensure due process in barring claims. If administrative feasibility only goes to proof of whether objective criteria are satisfied, then the allocation of the burden of proof should handle any constitutional problem

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - Circuit split
    - Accepts administrative feasibility as a necessary part of ascertainability
      - *First Circuit:*
        - *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) ("At the class certification stage, the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members. The court may proceed with certification so long as this mechanism will be 'administratively feasible,' *see Carrera*, 727 F.3d at 307, and protective of defendants' Seventh Amendment and due process rights[.]")
      - *Third Circuit*: Byrd v. Aaron's Inc., 784 F.3d 154, 162-63 (3d Cir. 2015)
        - Marcus v. BMW of North America, LLC, 687 F.3d 583, 593 (3d Cir. 2012) ("The ascertainability requirement serves several important objectives. First, it eliminates "serious administrative burdens that are incongruous with the efficiencies expected in a class action" by insisting on the easy identification of class members. Second, it protects absent class members by facilitating the "best notice practicable" under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.") (internal citations omitted); *accord In re* Niaspan Antitrust Litig., 67 F.4th 118, 132 (3d Cir. 2023) (detailed analysis reaffirming administrative feasibility as part of ascertainability)
        - Carrera v. Bayer Corp., 727 F.3d 300, 307-08 (3d Cir. 2013) (requiring putative class representatives prove that the identification of class members will be "a manageable process that does not require much, if any, individual factual inquiry") (internal quotation marks omitted)
      - *Fourth Circuit*: EQT Prod. Co. v. Adair, 764 F.3d 347, 358-59 (4th Cir. 2014)

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - Circuit split
    - Rejects administrative feasibility as an independent requirement
      - *Second Circuit:* In re Petrobras Sec., 862 F.3d 250, 267 (2d Cir. 2017)
      - *Sixth Circuit*: Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015)
      - *Seventh Circuit*: Mullins v. Direct Digital, LLC, 795 F.3d 654, 662-63 (7th Cir. 2015)
      - *Eight Circuit*: Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995-96 (8th Cir. 2016)
      - *Ninth Circuit*: Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.4 (9th Cir. 2017)
      - *Tenth Circuit*: *Cline v. Sunoco, Inc. (R&M)*, 159 F.4th 1171, 1196 (10th Cir. 2025)
      - *Eleventh Circuit*: Cherry v. Dometic Corp., 986 F.3d 1296, 1302-04 (11th Cir. 2021)
      - *D.C. Circuit (district courts only)*: In re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Practices Litig., 422 F. Supp. 3d 194, 242 (D.D.C. 2019)
    - Fifth Circuit remains unclear

1. Well-defined class ("ascertainability")

- "Administrative feasibility"
  - Example: *Briseno v. ConAgra Foods, Inc.*[1]
    - In 2017, the Ninth Circuit found that no separate "administrative feasibility" exists in Rule 23.
    - *Alleged class definition*: "All persons who reside in [certain named states] who have purchased Wesson Oils within the applicable statute of limitations periods established by the laws of their state of residence . . . "
    - *Defendants*: Class certification must be denied because no administratively feasible way to identify class members since consumers typically do not save their grocery receipts and so would not be able to reliably identify themselves as class members.
      - NB: This objection goes to the administrative feasibility of providing proof of class membership, not to whether the class is objectively defined
    - *Ninth Circuit*: Rejected separate administrative feasibility requirement: To the extent concerns arise about the identification of class members, those concerns are subsumed in Rule 23's superiority analysis, which considers whether the class is defined clearly with objective criteria and is manageable.[1]

[1] *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).
[2] *Id*. at 1124 n.4, 1127

2. FRCP 23(a)(1): Numerosity

- General rules
  - Requires that the class must be so numerous that joinder of all members is impracticable
    - Does not require that joinder is impossible
    - Only requires that joinder of all class members would pose a strong litigation hardship or inconvenience in the particular circumstances of the case
  - Establishes the need for the class action device
    - Without a multiplicity of potential parties there is no need to employ a representative action

2. FRCP 23(a)(1): Numerosity

- No absolute numerical thresholds
  - General rule
    - There are no absolute numerical thresholds in determining whether the numerosity requirement is satisfied
    - That said, the first step in a numerosity analysis is to estimate the number of members in the putative class
      - Defendants often have sales records, which can be discovered
      - Experts also can be used to estimated the number of class members
  - Judicial tendencies
    - But classes with 40 or more putative members typically meet the requirement with no other showing of difficulty of joinder
      - Some circuits rebuttably presume numerosity with putative classes of 40 or more[1]
    - Class with 20 or fewer members almost always rejected because joinder is deemed practicable
    - Classes with between 20 and 30 members are mixed, but frequently rejected

[1] *See, e.g.*, *In re* Modafinil Antitrust Litig., 837 F.3d 238, 250-51 (3d Cir. 2016); Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995); *In re* Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 202 (S.D.N.Y. 2018) *see also* Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 859 (7th Cir. 2017) ("While there is no magic number that applies to every case, a forty–member class is often regarded as sufficient to meet the numerosity requirement."); *In re* Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 397 (D.R.I. 2019) (same)

2. FRCP 23(a)(1): Numerosity

- General rules
  - Joinder
    - One means by which additional persons become parties to an existing action
    - FRCP 19: Compulsory joinder of "necessary" parties
      - Requires joinder of parties whose presence in the case is necessary, for example, if—
        - Absence would prevent the court from giving complete relief to the existing parties
        - Absence would prevent impair that person's ability to protect its interests
        - Absence could subject an existing party to a substantial risk of duplicative damages or inconsistent injunctive relief
      - Court may order joinder of necessary parties
        - Subject to personal jurisdiction and venue requirements
        - If a necessary party cannot be joined, then court must consider whether the action should proceed or be dismissed
    - FRCP 20: Permissive joinder
      - Court may permit joinder of other persons if—
        - As a putative plaintiff, they (a) assert a right to relief jointly, severally, or in the alternative arising out of the same transaction or occurrence, and (b) there is a common question of law or fact to all plaintiffs in the action
        - As a putative defendant, they (a) have asserted against them a right to relief jointly, severally, or in the alternative arising out of the same transaction or occurrence, and (b) there is a common question of law or fact to all defendants in the action

2. FRCP 23(a)(1): Numerosity

- General rules
  - Considerations whether joinder is impracticable[1]
    - Number of members of the putative class
    - Judicial economy
    - Claimants' ability and motivation to litigate as joined plaintiffs[2]
    - Financial resources of class members
    - Geographic dispersion of class members
    - Ability to identify future claimants
    - Whether the claims are for injunctive relief or for damages
    - Requests for relief that could affect future class members
    - Knowledge of the names and existence of potential class members
    - Whether potential class members have already joined in other actions

Most important factors

[1] For a good discussion, see *In re* Modafinil Antitrust Litig., 837 F.3d 238, 249-60 (3d Cir. 2016); *In re* Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227, 239-41 (4th Cir. 2021) (Niemeyer, J., concurring); *see also* *In re* Namenda Direct Purchaser Antitrust Litig., 331 F. Supp. 3d 152, 202 (S.D.N.Y. 2018) (noting some additional factors).

[2] The fact that some putative class members are not economically motivated to litigate via joinder is not dispositive. Rather, it is only one of the factors to be considered in making an impracticability of joinder consideration. *See In re* Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227, 236 n. 7 (4th Cir. 2021).

2. FRCP 23(a)(1): Numerosity

- General rules
  - Considerations whether joinder is impracticable
    - Where failure to certify class would introduce multiple new plaintiffs in the existing multiple-defendant action, making the action less efficient than if the putative class was certified[1]
    - *Note*: When a putative class that just satisfies numerosity contains some members with sufficiently large damages to make an individual action attractive to them, the class still satisfies numerosity if the remaining class members lack the incentive to pursue individual their small claims[2]

[1] *See In re* Opana ER Antitrust Litig., No. 14 C 10150, 2021 WL 3627733, at *3 (N.D. Ill. June 4, 2021) (in a reverse payment action with an end-user payor class and individual plaintiffs, failure to certify a class of 36 direct purchasers—presumably drug wholesalers—that otherwise satisfies the Rule 23 requirements would introduce multiple new plaintiffs into the action, further complicating the action and making joinder impracticable).

[2] *See In re* Ranbaxy Generic Drug Application Antitrust Litig., 338 F.R.D. 294, 304 (D. Mass. 2021) (finding a class of 36 drug wholesalers members satisfied numerosity even though three members dominated the class claims)

2. FRCP 23(a)(1): Numerosity

- Application to antitrust cases
  - Almost never contested by defendants
  - There are exceptions
    - In re Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227 (4th Cir. 2021)
      - The court of appeals vacated class certification and remanded in a pay-to-delay case that involved a putative class of 35 sophisticated drug wholesalers with large claims--including three firms that accounted for 97 percent of all class purchases
      - The court of appeals held, among other things, that the district court committed legal error and therefore abused its discretion by looking to impracticability of individual suits, rather than impracticability of joinder in a single litigation (which allows the plaintiffs to spread the costs of litigation), in determining that the class satisfied numerosity
      - Distinction:
        - *Impracticability of individual suits*: Whether each class member would find it economically rational to pursue individual litigation (focuses on claim size)
        - *Impracticability of joinder*: Whether joining all plaintiffs in single action would be impracticable (focuses on litigation management)
      - Significance
        - In cases with sophisticated purchasers and large individual claims, numerosity requires showing that joinder itself (not individual litigation) is impracticable

2. FRCP 23(a)(2): Commonality

- Rule 23(a)(2)
  - Requires that "there are questions of law or fact common to the class"[1]
- Common vs. individual questions
  - *Tyson Foods*:

> An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."[2]

  - Other judicial observations
    - "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question."[3]

[1] Fed. R. Civ. P. 23(a)(2).
[2] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (citation omitted).
[3] Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012).

2. FRCP 23(a)(2): Commonality

- Purpose
  - Commonality is the "glue" which holds the class together and makes it meaningful to try the claims of class members in a single action
    - Key to judicial efficiency
- General rules
  - One question of law or fact common to the class is sufficient[1]
  - Does not require that common questions predominate individual questions
  - Permits some variation in the details of individual claims
    - Especially on damages sustained
- Older cases
  - State that it is *sufficient* for commonality if—
    a. there are shared legal issues notwithstanding divergent factual predicates, *or*
    b. when there is a "common core of salient facts" or a "common nucleus of operative facts" notwithstanding a request for different legal remedies within the class

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011) ("Even a single [common] question will do.").

2. FRCP 23(a)(2): Commonality

- But *Wal-Mart* put an important gloss on these rules:
  - The Rule 23(a)(2) "language is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'"[1]
    - "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[2]
  - The *Wal-Mart* gloss:

> [C]laims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> > "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."[3]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (citation omitted).
[2] *Id*. at 350 (citation omitted).
[3] Id. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–132 (2009)); *applied* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 663 (9th Cir. 2022) (en banc).

2. FRCP 23(a)(2): Commonality

- The *Wal-Mart* rule
  - So not any "common question" satisfies commonality, the common question must be one that is "central" to the validity of the class claims
  - Rule: Post-*Wal-Mart*, commonality is present only if —
    1. the claims of the class are based on a common contention [underlying set of facts],
    2. the common question is important in the sense that the "determination of its truth or falsity will resolve an issue that is central to the validity" of the class claims to redress that injury, *and*
    3. the common question is capable of resolution on a classwide basis at trial.[1]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (observing that what matters for the commonality inquiry "is not the raising of common 'questions' . . . but rather the capacity of a classwide proceeding to generate common answers"); accord Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc) (applying *Wal-Mart's* "common answers" test in tuna price-fixing class action).

2. FRCP 23(a)(2): Commonality

- Application to antitrust cases
  - Typical "common questions" in a price-fixing action:
    - Whether defendants and their co-conspirators engaged in a conspiracy to raise, fix and maintain prices at supracompetitive levels
    - The duration and extent of defendants' alleged conspiracy
    - Whether each defendant was a participant in the conspiracy
    - Whether defendants' conspiracy violated Section 1 of the Sherman Act
    - The effect of defendants' alleged conspiracy upon prices actually charged to the putative class members
    - The appropriate measure of damages
  - Other frequent common questions in other types of antitrust cases:
    - The definition of the relevant markets
    - Whether the defendants had market power in the relevant market
    - Whether the defendants engaged in the same anticompetitive conduct toward the putative class members
    - Whether the defendants' conduct violated the antitrust laws
  - Almost never contested by defendants

2. FRCP 23(a)(3): Typicality

- General rules
  - Requires that "the claims or defenses of the representative parties must be typical of the *claims* or *defenses* of the class"
  - Purpose
    1. Ensures that the interests of the named plaintiff align with the interests of the class members *and*
    2. Named plaintiff's claims have the same essential characteristics as the claims of the class as a whole and suffer the same type of injury, *so that*
    3. Class representatives will work to the benefit of the entire class when pursuing their own individual goals in the litigation

    Aligns with adequacy of representation

2. FRCP 23(a)(3): Typicality

- General rules
  - Central inquiry
    - Whether the named plaintiff has the *incentive* to prove all the elements of the offense that would be presented by the individual members of the class if they had initiated their own individual actions and so adequately represents the class
  - *Presumption*: Named plaintiff's claims and defenses are typical if they—
    1. arise from the same event, practice, or course of conduct that forms the basis of the claims of the class as a whole, *and*
    2. are predicated on the same legal or remedial theory[1]
  - Distinguished from commonality
    - Typicality is broader than commonality since it looks at the relationship of the *claims* of the named plaintiffs and absent class members and not just whether a "common question"—which could only pertain to part of a claim—exists.

[1] *See, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 532 (3d Cir. 2004); *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *5 (N.D. Ill. May 27, 2022); *In re* Ranbaxy Generic Drug Application Antitrust Litig., 338 F.R.D. 294, 301 (D. Mass. 2021); *In re* Blue Cross Blue Shield Antitrust Litig., No. 2:13-CV-20000-RDP, 2020 WL 8256366, at *9 (N.D. Ala. Nov. 30, 2020); *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 499 (W.D. Pa. 2019).

2. FRCP 23(a)(3): Typicality

- General rules
  - Aligns with adequacy of representation and often considered together—essentially two sides of the same coin
    1. *Typicality*: Focuses on the incentives of the named plaintiffs to prosecute and obtain relief align with the interests of the absent class members, and
    2. *Adequacy*: Focuses on whether the named plaintiffs have potential conflicts with the class members
  - Factual differences
    - Strong presumption that typicality is satisfied when the allegation is that the defendants engaged in a common illegal scheme with respect to all members of the class
    - Differences that usually will not defeat typicality—
      - Purchases across defendants or over time compared to other putative class members
      - Damages sustained by individual putative class members

2. FRCP 23(a)(3): Typicality

- Challenges to typicality
  - In challenging typicality, defendants have the burden of production that the atypical features of the named plaintiff's claim will—
    - become a major focus of the litigation, *or*
    - skew the named plaintiff's incentives to adequately prosecute the claims of absent class members
  - Example:
    - A purchaser with an assigned direct purchaser claim is a named plaintiff in a direct purchaser class action. Defendants challenge the validity of the assignment of the direct purchaser claim.
    - *Court*: Does not destroy typicality since the challenge will not be a major focus in the litigation[1]

[1] *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 304-05 (E.D. Mich. 2001) ("It is only when the defense will 'skew the focus of the litigation' and create 'a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'") (quoting Alaska v. Suburban Propane Gas Corp., 123 F.3d 1317, 1321 (9th Cir. 1997) (internal quotes and citation omitted))

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Rarely contested where named plaintiff—
    1. is a member of the putative class
    2. has constitutional and prudential standing to pursue its individual claims
    3. has claims that are predicated on a legal theory generally applicable to the claims of absent class members, *and*
    4. is not subject to any unique defense that would "skew the focus of the litigation
  - Named plaintiff in a price-fixing action need not—
    - purchase from all of the alleged co-conspirators
    - purchase in precisely the same way as absent class members

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Differences in state law in indirect purchaser actions
    - A number of courts have held that the slight variations that exist in the antitrust laws of various states do not make the named plaintiff's claims under the law of one state atypical[1]
  - Standing in indirect purchaser actions
    - Some courts have held that for each claim under a state law, a named plaintiff must exist with Article III standing to bring that particular claim[2]
      - For, for example, a putative class action invoking Minnesota antitrust law must have a named plaintiff with Article III standing to bring an individual claim under the Minnesota law

[1] *See, e.g.*, *In re* Namenda Indirect Purchaser Antitrust Litig., No. 115CV6549CMRWL, 2021 WL 509988, at *11 (S.D.N.Y. Feb. 11, 2021); *In re* Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 335 F.R.D. 1, 29-30 (E.D.N.Y. 2020) (certifying a class of end-payor plaintiffs whose claims arose from the antitrust laws of more than thirty states); *In re* Nexium (Esomeprazole) Antitrust Litig., 297 F.R.D. 168, 176 (D. Mass. 2013) (certifying a class of end payors whose claims arose under the antitrust laws of twenty-six states); *but see In re* Capacitors Antitrust Litig., No. 17-MD-02801-JD, 2020 WL 6462393, at *6 (N.D. Cal. Nov. 3, 2020) (finding material differences and denying class certification).

[2] *See, e.g.*, *In re* Capacitors Antitrust Litig., 154 F. Supp. 3d 918, 923-27 (N.D. Cal. 2015); *accord In re* Glumetza Antitrust Litig., No. C 19-05822 WHA, 2021 WL 352059, at *2 (N.D. Cal. Feb. 2, 2021); *In re* Hard Disk Drive Suspension Assemblies Antitrust Litig., No. 19-MD-02918-MMC, 2020 WL 6270948, at *4 (N.D. Cal. Oct. 23, 2020) *In re* Packaged Seafood Prod. Antitrust Litig., 242 F. Supp. 3d 1033, 1095 (S.D. Cal. 2017).

2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Differences in purchase amounts
    - *Example*: Typicality requirement satisfied even through the named plaintiff—
      - did not purchase from all of the alleged co-conspirator defendants,
      - purchased only one of the five products alleged to be subject to price fixing,
      - purchased only $4632 of the product from one defendant, while other customers purchased millions of dollars of the product from the same defendant, *and*
      - made only a one-time spot purchase while other class members negotiated yearly supply agreements or tolling arrangements[1]

[1] *In re* Bromine Antitrust Litig., 203 F.R.D. 403, 411 (S.D. Ind. 2001).

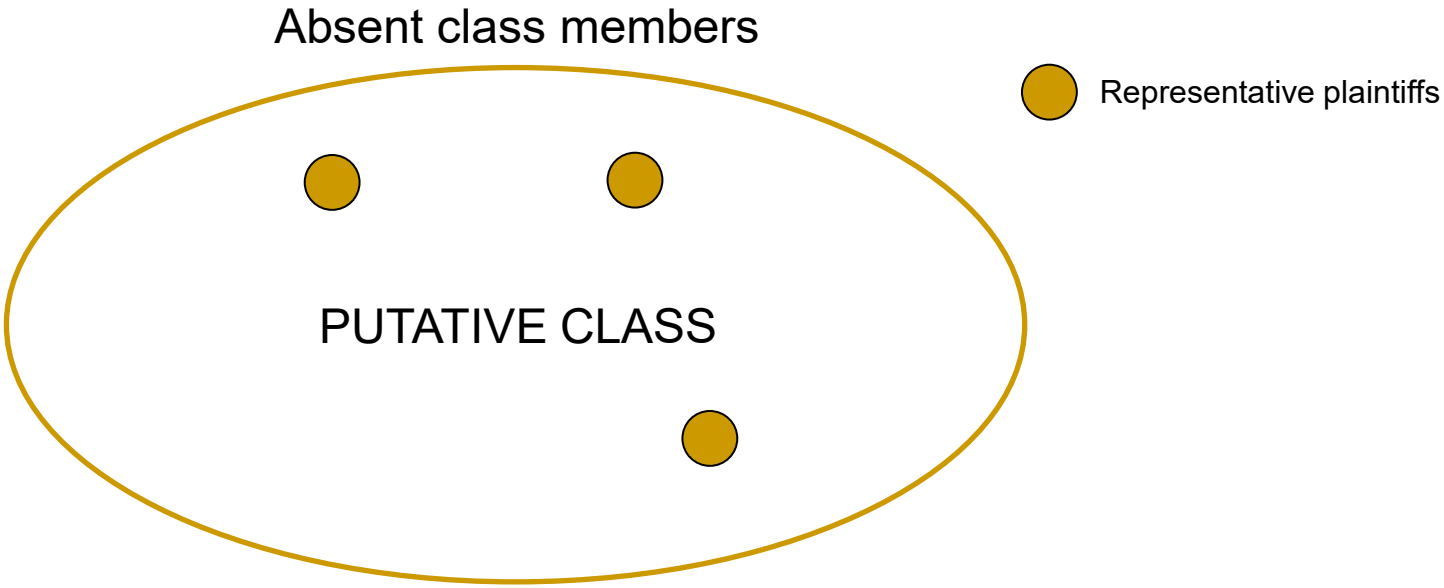
2. FRCP 23(a)(3): Typicality

- Application in antitrust cases
  - Differences in purchase amounts
    - *Counterexample*: Typicality requirement not satisfied when—
      - Named plaintiffs included only individuals and small businesses that purchased small numbers of computers, but the class also included large enterprise customers, which purchased larger volumes and different types of computers and which often negotiated multiyear purchase agreements for bundles for products and services, and so purchased in a "different competitive landscape" that the named plaintiffs[1]
    - Reconciliation
      - Where named plaintiffs purchased at retail on a "take it or leave it" basis, their claims are not typical of large purchasers who negotiated their purchase price[2]
      - Also, when the alleged conspiracy operated on restricting supply rather than setting prices, differences in purchaser bargaining power are not relevant to the claim so that typicality is satisfied[3]

[1] *In re* Intel Corp. Microprocessor Antitrust Litig., No. CV 05-485-LPS, 2014 WL 6601941,at *11-12 (D. Del. Aug. 6, 2014).
[2] *See In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *5 (N.D. Ill. May 27, 2022) (distinguishing *In re* Graphics Processing Units, 253 F.R.D. 478, 489 (N.D. Cal. 2008), and *In re* Optical Disk Drive, 303 F.R.D. 311, 317 (N.D. Cal. 2014)).
[3] *Broiler Chicken*, 2022 WL 1720468, at *5 ("Rather, Plaintiffs allege that Defendants restricted supply across the market in order to boost prices of a commodity. Bargaining power is not directly relevant to the claims.").

2. FRCP 23(a): Commonality and typicality

Commonality: Do the class members share a common question of law or fact? Goes to the *cohesiveness* of the class members as a group.



Typicality: Are the claims and defenses of the representative plaintiffs typical of those in the class as a whole? Goes to whether the named plaintiffs have the *incentives* to prove the elements of the claims of the absent class members.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Requires that the *representative parties* "will fairly and adequately protect the interests of the class"
    - Focus is on uncovering *conflicts of interest* between named parties and the class they seek to represent
    - Given the binding effect of a final judgment in a class action, adequacy of representation is required by due process[1]
    - Must be continuous throughout the litigation
    - Named plaintiff acts as a fiduciary to absent class members in the prosecution of the class claims
  - Historical note
    - Until Rule 23 was amended in 2003, Rule 23(a)(4) addressed both the adequacy of representation by—
      - The representative plaintiffs, *and*
      - Class counsel
    - Afterwards, adequacy of class counsel was moved into a new Rule 23(g)
      - Many modern courts, however, continue to analyze the adequacy of the named plaintiffs and class counsel under Rule 23(a)(4).[2]

[1] Hansberry v. Lee, 311 U.S. 32 (1940).

[2] See below for a discussion of adequacy of class counsel.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Named plaintiff requirements
    1. Must be a member of the class it seeks to represent
    2. Must be a vigorous representative in advocating the interests of the class, *and*
       - But requires only a "minimal degree of knowledge" about the case[1]
    3. Must not have interests that are antagonistic to the interests of other class members
       - Operationally, the absence of conflicts with absent class members is the most frequently litigated Rule 23(a)(4) issue
       - But only "fundamental conflicts" will defeat adequacy of representation[2]
       - Moreover, unlike the usual non-class action case, the named representatives do not control or instruct class counsel
         - Class counsel have a fiduciary obligation to the class as a whole and cannot act contrary to interest of the class even if instructed by a named plaintiff

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 272 (3d Cir. 2020); In re Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *10 (N.D. Cal. Nov. 14, 2018) ("While some of the corporate designees may have made deposition statements that reflected a rather general understanding of the litigation, none were so 'startlingly unfamiliar with the case' that they vitiated the possibility of serving as a class representative.") (citation omitted).

[2] *See Suboxone*, 967 F.3d at 272.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Knowledge of named plaintiffs
    - Courts recognize and accept that, in antitrust class actions, most of the information about the basis of the suit will come from counsel, not the personal knowledge of the named plaintiff
  - Typical adequacy findings:

> Second, [monopolization defendant] Reckitt's claim that Burlington [the named plaintiff] has ceded control of this litigation to class counsel, and that this creates a risk of conflicts, does not render Burlington an inadequate representative. Reckitt cites no precedent from this Court for its argument that a class representative must "control" the litigation. Indeed, we have observed that "it is counsel for the class representative and not the named parties ... who direct and manage [class] actions. Every experienced federal judge knows that any statements to the contrary [are] sheer sophistry." *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 292 (3d Cir. 2010) (alterations and omission in original) (quoting *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973)). Moreover, Burlington is not a disengaged representative. *The record shows that Burlington is aware of its role as a fiduciary, understands the basis for the claimed injury, has an incentive to recover its proportionate share of damages, monitors the litigation, produced documents, and has the requisite interest in and knowledge about the case to satisfy the adequacy requirement*.[1]

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 273 (3d Cir. 2020) (emphasis added).

2. FRCP 23(a)(4): Adequacy of representation

- Separate class solutions to Rule 23(a)(4) problems
  - To avoid antagonistic interests, any fundamental conflict must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the plaintiffs[1]
  - To achieve this structural solution, courts must create homogenous subclasses under Rule 23(c)(4)(B) to ensure that each group of class members has separate named representative(s) and subgroup counsel that are dedicated to protecting the interest of the respective subclass members
- Class action settlements
  - Adequacy must be determined independently of the general fairness review of the settlement
  - The fact that the settlement may have overall benefits for all class members is not determinative of adequacy, since there remains the question of the allocation of the benefits among class members

[1] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997); *see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999).

2. FRCP 23(a)(4): Adequacy of representation

- Common problem areas
  - Failure of the named plaintiff to vigorously prosecute the action
  - Abandonment of particular remedies to the detriment of some or all putative class members
    - Claim or issue preclusion may prevent class members from pursuing foregone remedies in a subsequent action
  - Intraclass conflicts
    - Pitting a named representative against some absent class members (or absent class members against each other)
    - With potentially antagonistic class members being represented by the same class counsel
  - Collusive settlements
    - Named plaintiffs–and the named plaintiffs' counsel–attempt to use the class action as leverage to obtain a settlement favorable to themselves but unfavorable to absent class members
    - That is, in return for a settlement favorable to themselves, the named plaintiffs will champion a class settlement that provides absent class members will little or no relief but exhausts their claims

2. FRCP 23(a)(4): Adequacy of representation

- Application in antitrust cases
  - Some other possible problem areas
    - Former franchisee with no on-going business relationship with a defendant seeks to represent a class containing current franchisees with continuing business relationships with the defendant
    - Named plaintiff advocates a legal theory or a particular measure of damages that disadvantages some members of the class relative to other members
    - Named plaintiff seeks a form of relief not likely to be favored by some members of the class
  - Usually not problems
    - Named plaintiff is a competitor with absent class members
    - Named plaintiff purchases different products, different mixes of products, different amounts, or over different time periods than some of the absent class members
    - Named plaintiff did not purchase from each of the named defendants
    - Named plaintiff differs in its strategy in approaching the litigation from some absent class members

2. FRCP 23(a)(4): Adequacy of representation

- *Example*: *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litigation[1]
  - Background
    - Class action representing 12 million merchants that challenged Visa and MasterCard network rules prohibiting merchants from imposing surcharges on credit card transactions or from steering customers to a card with lower fees
    - After nearly ten years of litigation, parties agreed to a settlement that released all claims in exchange for disparate relief to each of two classes:
      - A Rule 23(b)(3) covering merchants that accepted Visa and/or MasterCard from January 1, 2004, to November 28, 2012, which would receive up to $7.25 billion
      - A Rule 23(b)2) class covering merchants that accepted (or will accept) Visa and/or MasterCard from November 28, 2012, onwards forever, which would receive injunctive relief
    - Two classes represented by the same counsel

[1] No. 12-4671-cv(L) (2d Cir. June 30, 2016).

2. FRCP 23(a)(4): Adequacy of representation

- *Example*: *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litigation[1]
  - Second Circuit: Vacated settlement for inadequate representation

> "The conflict is clear between merchants of the (b)(3) class, which are pursuing solely monetary relief, and merchants in the (b)(2) class, defined as those seeking only injunctive relief. The former would want to maximize cash compensation for past harm, and the latter would want to maximize restraints on network rules to prevent harm in the future."[1]
>
> "Moreover, many members of the (b)(3) class have little to no interest in the efficacy of the injunctive relief because they no longer operate, or no longer accept Visa or MasterCard, or have declining credit card sales. By the same token, many members of the (b)(2) class have little to no interest in the size of the damages award because they did not operate or accept Visa or MasterCard before November 28, 2012, or have growing credit card sales. Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement."[2]
>
> "Class counsel stood to gain enormously if they got the deal done. The (up to) $7.25 billion in relief for the (b)(3) class was the 'largest-ever cash settlement in an antitrust class action. For their services, the district court granted class counsel $544.8 million in fees. The district court calculated these fees based on a graduated percentage cut of the (b)(3) class's recovery; thus counsel got more money for each additional dollar they secured for the (b)(3) class. But the district court's calculation of fees explicitly did not rely on any benefit that would accrue to the (b)(2) class, and class counsel did not even ask to be compensated based on the size or significance of the injunctive relief."[3]

[1] 827 F.3d 223, 233 (2d Cir. 2016). [2] *Id*. at 234. [3] *Id*. (internal citations omitted).

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel
    - Prior to the 2003 amendments, adequately of class counsel was an element of the Rule 23(a)(4) adequacy of representation requirement
      - So pre-2003 cases will discuss adequacy of class counsel along with adequacy of the named plaintiffs in the Rule 23(a)(4) analysis
    - The 2003 amendments moved adequacy of class counsel into a new Subsection 23(g), which governs both the substantive and procedural requirements in appointing class counsel
    - Policy concerns
      - Settlements may be driven by class counsel's interest in obtaining a fee award and not by the best interests of the class

> We and other courts have often remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests.[1]

- This is of "particular significance" where class members "lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf."[2]

[1] Creative Montessori Learning Centers v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011) (collecting cases). [2] *Id*. at 917-18.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel (con't)
    - Anything "pertinent to counsel's ability to fairly and adequately represent the interests of the class" bears on the class certification decision.1
    - Rule 23(g) also requires the following factors specifically to be considered in appointing class counsel:
      - The work counsel has done in identifying or investigating potential claims in the action;
      - Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
      - Counsel's knowledge of the applicable law; and
      - The resources that counsel will commit to representing the class2

[1] Fed. R. Civ. P. 23(g)(1)(B).
[2] *Id*. 23(g)(1)(A).

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel (con't)
    - Typical grounds for challenging adequacy of counsel representations
      - Class counsel represented named or absent class members with conflicting interests
      - Class counsel (to date) failed to vigorously prosecute the action
      - Class counsel abandoned remedies to the detriment of the class
      - Class counsel lacks expertise in class action matters
        - This is rare because, in the usual case, multiple attorneys seek to represent the class and the court will select one with the requisite expertise and experience
      - Class counsel participated in a collusive settlement
        - At one time, it was common in settlement cases to challenge counsel's adequacy when counsel negotiated a large fee in the settlement. Courts resolved this by refusing to approve settlements that allocated funds for attorneys' fees. Today, courts insist on a separate proceeding where the court awards attorneys' fees from the total settlement amount.

2. FRCP 23(a)(4): Adequacy of representation

- General rules
  - Adequacy of class counsel (con't)
    - Inadequate representation/conflict of interest with the class on litigation strategy
      - *Example*: *McDonald's* "no-hire" case (denying class certification)

Note: In deciding an earlier motion to dismiss, the court held that the per se rule did not apply and that the quick look *might* apply depending on the evidence later produced. The plaintiff declined the invitation to amend the complaint to include a rule of reason count.

> Even were it not the case that individual issues will predominate, the Court would be hesitant to certify the proposed class. One unusual aspect of this case is that, while plaintiffs cannot prevail as class, they could lose as one. That owes to the fact that counsel for the named plaintiff made a strategic decision early in this case not to amend the complaint to add a claim under the rule of reason. If the Court certified a nationwide class (which, again, would not be appropriate for the reasons outlined above), it would be to the great detriment of the class. The class members would lose on a rule-of-reason claim, because their attorneys waived it. Dr. Singer, plaintiffs' expert, calculated aggregate class damages at $2.74 billion. It is no surprise, then, that attorneys might take a shot at a nationwide-class jackpot (of which they might hope to collect a third, which is about $913,000,000.00) rather than propose a small, local class under the rule of reason. The reward to any given plaintiff would likely be quite similar whether he proceeded as part of a small, local class or a massive nationwide class. Only the lawyers had something to gain by foregoing a claim under the rule of reason, which makes one wonder whether the attorneys were looking out mostly for themselves when they chose not to amend to add a claim under the rule of reason. Perhaps these attorneys took a gamble, choosing not to pursue a rule-of-reason claim in the hopes of the huge reward of certifying a nationwide class under quick-look analysis. Such a self-interested decision would not instill confidence that the attorneys would adequately represent the class.[1]

[1] DeSlandes v. McDonald's USA, LLC, No. 17 C 4857, 2021 WL 3187668, at *14 (N.D. Ill. July 28, 2021) (record citation omitted).

Rule 23(b)

- Requirement
  - In addition to satisfying the four elements of Rule 23(a), recall that every federal class action must fall into one of the three FRCP 23(b) categories
  - Rule 23(b)(1) class—Separate actions create a risk of either:
    - Inconsistent adjudications establishing incompatible standards on the defendant, *or*
    - Adjudications that would be dispositive of the interests of similarly situated persons
  - Rule 23(b)(2) class
    1. Defendant acted in ways generally applicable to the class, so that
    2. final injunctive relief is appropriate for the class as a whole
  - Rule 23(b)(3) class
    1. Questions of law or fact common to the class predominate over individual questions, and
       - *General rule*: Common issues predominate in proving an antitrust violation when the focus is on the defendants' conduct and not on the conduct of the individual class members.
    2. Class action is superior to other means of adjudicating the claims

Rule 23(b)

- Difference in applications
  - Rule 23(b)(1) and Rule 23(b)(2) class actions
    - Designed for cases in which the class must stand or fall together because of the indivisible interests of the class members in the outcome of the litigation
      - Driven by the notion that rights that must stand or fall together should be tried together—a rule of necessity
    - No mandatory right to notice of the class action or right to opt out of the class
    - Although court may order notice and opt-out opportunity in its discretion[1]
  - Rule 23(b)(3)
    - Designed for cases:
      - in which there may be differences in the treatment of individual class members
      - but where there is sufficient commonalities in the issues to make a single trial of the common issues efficient—a rule of judicial efficiency and convenience
    - Given the differences, however, Rule 23 provides for a mandatory right to—
      - Reasonable class-wide notice of class certification
      - Individual notice where possible with reasonable diligence
      - Opt out of the class and not be bound by any class judgment

[1] Fed. R. Civ. P. 23(c)(2)(A).

Rule 23(b)(1) class actions

- Core concept
  - Applies when separate actions would create a substantial risk of prejudice either to the defendant or to absent class members
- Rule 23(b)(1) requirements: Separate actions create a risk of—
  - *Rule 23(b)(1)(A) actions*: Inconsistent adjudications establishing incompatible standards of conduct for the defendant, or
  - *Rule 23(b)(1)(B) actions*: Individual adjudications would be dispositive of the interests of other class members that do not have final judgments
- Key features
  - Designed for cases involving indivisible or mutually dependent rights
  - Typically, mandatory classes (no automatic right to opt out)
  - Driven by necessity, not convenience
- Application in antitrust
  - Rare
  - Most antitrust class actions proceed under Rule 23(b)(3) (damages) or Rule 23(b)(2) (injunctive relief)

Rule 23(b)(1) class actions

1. Rule 23(b)(1)(A) actions: Incompatible standards
   - Core concept
     - Separate actions create a risk that the defendant would be subject to conflicting legal obligations
   - Rule 23(b)(1)(A) requirements
     - Inconsistent adjudications establishing incompatible standards of conduct for the defendant
   - Observations
     - Typically arises where a single rule, contract, or legal legal instrument governs multiple parties, and separate actions could produce conflicting interpretations or obligations
     - Requires a risk of conflicting obligations, not merely different outcomes
       - Different but compatible obligations are not sufficient
     - Rarely used today; most injunction cases proceed under Rule 23(b)(2)
   - Antitrust examples (very rare)
     - Older cases challenging league-wide rules adopted by competing teams (e.g., player restraints such as reserve clauses or drafts)
       - Relief sought was typically **declaratory or injunctive**, requiring a uniform rule across the league
       - Conflicting judgments could require the league to both enforce and not enforce the same rule

Rule 23(b)(1) class actions

- Rule 23(b)(1)(B) actions: "Limited fund" cases
  - Core concept
    - Separate actions create a risk that early adjudications would impair or effectively determine the rights of other class members
  - Rule 23(b)(1)(B) requirements: Separate actions create a risk that early adjudications would—
    - Be dispositive of the interests of other class members, *or*
    - Would substantially impair or impede their ability to protect their interests
  - Observations
    - Typically arises where multiple claimants seek recovery from a limited or depleting pool of resources
    - Early plaintiffs could obtain judgments that exhaust available resources, leaving later claimants without relief
      - Plaintiff must demonstrate the existence of a limited fund
    - Focus is on protecting absent class members, not the defendant
    - Rarely used in modern practice
  - Antitrust examples: None

Rule 23(b)(1) class actions

- No mandatory right to notice and opt-out opportunity
  - Court may provide in its discretion as part of its powers to manage the class action
  - Public policy
    - Necessity of a single, classwide resolution
      - Incompatible obligations or depletion of a limited fund make opt-outs impractical
    - Protection of absent class members
      - Prevents early adjudications from impairing the rights of others
    - Administrative feasibility (manageability and fairness)
      - A court can a single proceeding allows the court to administer relief in an orderly manner without prejudice to the defendant or absent class members
    - When courts may exercise discretion to provide notice or opt-out
      - Where individual interests are substantial or heterogeneous
      - Where the risk of prejudice to absent members can be mitigated without defeating the purpose of the class
      - Where notice is needed to ensure adequate representation or fairness

Rule 23(b)(2) class actions

- Core concept
  - Defendant has acted in a way that applies uniformly to the class, so that a single injunction or declaratory judgment can provide relief to all class members
- Rule 23(b)(2) standard
  - Defendant has acted or refused to act on grounds that apply generally to the class, so that
  - final injunctive or declaratory relief is appropriate for the class as a whole
- Observations
  - Focus is on indivisible relief—the same remedy applies to the class as a whole
  - Appropriate where relief can be granted in a single, classwide injunction or declaration
  - Not appropriate where relief would require individualized determinations
  - Damages are generally not permitted (except incidental damages)
- Application in antitrust
  - Used for injunctive relief against allegedly unlawful conduct
  - Damages claims proceed under Rule 23(b)(3)

Rule 23(b)(2) class actions

- Design
  - Crafted with civil rights cases in mind
  - Intended for cases in which class-wide injunctive or declaratory relief is appropriate, without any tailoring for individual class members[1]
    - May require the plaintiffs to specify the relief sought in some detail at the class certification stage in order to permit the court to test whether the Rule 23(b)(2) requirements are satisfied[2]
    - Rule 23(b)(2) does not authorize class certification when
      - each individual class member would be entitled to a different injunction or declaratory judgment against the defendant," *or*
      - "when each class member would be entitled to an individualized award of monetary damages."[2]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted.") (internal quotation marks omitted).
[2] *Id*. at 360-61.
[3] *See., e.g.*, Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 763 F.3d 1280 (11th Cir. 2014) (affirming denial of Rule 23(b)(2) class certification in a tying arrangement class action where the named plaintiff failed to identify exactly the dimensions of the injunction it was seeking and to show that this injunction would provide relief to every member of the class); *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-MD-2785-DDC-TJJ, 2020 WL 1873989, at *59 (D. Kan. Feb. 27, 2020) (denying Rule 23(b)(2) certification for plaintiffs' failure to specific relief sought in adequate detail); *In re* Processed Egg Prod. Antitrust Litig., 312 F.R.D. 124, 170 (E.D. Pa. 2015) ("The Court could not presently draft such an order because Plaintiffs have failed to specifically articulate the injunctive relief they seek.").

Rule 23(b)(2) class actions

- No mandatory right to notice and opt-out opportunity
  - Court may provide in its discretion as part of its powers to manage the class action
- *Query*: "Claim splitting" in Rule 23(b)(2) class actions
  - What preclusive effect, if any, does an injunction-only class action have on class members' ability to bring subsequent damages claims?[1]
    - *Usual rule against claim splitting*: "[A]a final judgment on the merits generally precludes a plaintiff from bringing a new lawsuit raising issues that could have been litigated in the first suit, but were not."[2]
  - In the class action context, courts are split:
    - *Majority rule*: Usual rule does not apply to class actions[3]
    - Some courts have explicitly reserved the right for class members to seek monetary damages in subsequent actions[4]

[1] For cases discussing the issue, see, for example, *In re* Processed Egg Prod. Antitrust Litig., 312 F.R.D. 124, 166-67 (E.D. Pa. 2015), and *In re* Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 578-79 (E.D. Tenn. 2014). *See also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 364 (2011) (raising question of whether a rule 23(b)(2) action could have preclusive effects).

[2] *In re* Vitamin C Antitrust Litig., 279 F.R.D. 90, 114 (E.D.N.Y.2012).

[3] *See, e.g.*, Gooch v. Life Investors Ins. Co. of Am., 672 F.3d 402, 428 n. 16 (6th Cir. 2012); Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996).

[4] *See, e.g.*, *Vitamin C*, 279 F.R.D. at 115-16.

Rule 23(b)(2) class actions

- Application in antitrust cases
  - Rare as the primary basis
    - Primarily antitrust labor cases
    - Some indirect purchaser injunctive actions
  - Courts sometimes split certifications in some antitrust cases, with
    - the injunctive relief portion certified under Rule 23(b)(2), *and*
    - the damages portion certified under Rule 23(b)(3)
  - Courts will deny certification when some class members may be harmed by the injunction
    - *Example*: A manufacturer gives lump-sum loyalty discounts in order to foreclose its competitors. OEMs may keep or use to lower the price of their products. If OEMs chose different strategies, an injunction to prohibit lump-sum discounts may harm some indirect customers that purchased from an OEM that passed on its discount, even if the manufacturer's strategy overall raised prices.[1]

[1] *See In re* Intel Corp. Microprocessor Antitrust Litig., No. CV 05-485-LPS, 2014 WL 6601941, at *20 (D. Del. Aug. 6, 2014) (denying Rule 23(b)(2) certification).

Rule 23(b)(2) class actions

- Defendant classes
  - Although rarely used, Rule 23 permits a plaintiff to sue a representative defendant for relief against a defendant class.
    - Rule 23(a) provides: "One or more members of a class may sue *or be sued* as representative parties on behalf of all members only if . . . ." (emphasis added)
    - All of the requirements of Rule 23 apply equally to defendant classes as they do to plaintiff classes
    - The few defendant class actions that are brought are typically under Rule 23(b)(2) for injunctive relief generally applicable to all defendant class members

Rule 23(b)(2) class actions

- Examples of antitrust defendant class actions
  - Associations and their members or affiliates
    - CBS v. ASCAP, 400 F. Supp. 737, 741 n.2 (S.D.N.Y. 1975), *rev'd and remanded*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded*, 441 U.S. 1 (1979)
    - Monument Builders of Pa., Inc. v. American Cemetery Ass'n, 206 F.R.D. 113, 114 (E.D. Pa. 2002)
    - *See In re* New Motor Vehicles Canadian Export Antitrust Litig., 307 F. Supp. 2d 136, 141 & n.7 (D. Me. 2004) (suggesting possibility of a defendant class)

Rule 23(b)(3) class actions

- Design
  - The only Rule 23(b) category that includes actions whose primary purpose is the recovery of compensatory money damages
    - "Rule 23(b)(3) is an "'adventuresome innovation' . . . framed for situations 'in which class-action treatment is not as clearly called for.'" [1]
  - Allows class certification in a much wider set of circumstances but with greater procedural protections
  - Foundations are convenience and judicial efficiency, not necessity
- Differences with Rule 23(b)(1) and 23(b)(2) classes
  - Absent class members in (b)(1) and (b)(2) classes do not, as a matter of right, have a right to notice or the opportunity to opt out of the class
    - The court, in its discretion, may order notice and provide an opt-out opportunity
  - Absent class members in (b)(3) classes are entitled to reasonable notice of the pendency of the action and right to opt-out of the class

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-15 (1997)).

Rule 23(b)(3) class actions

- Two requirements
  1. *Predominance of common questions*: Questions of law or fact common to the class predominate over any questions affecting on individual members
     - *Rule*: Predominance requires "the common, aggregation-enabling, issues in the case are more prevalent or important [at trial] than the non-common, aggregation-defeating, individual issues."[1]
       - *Key*: The question at the class certification stage is to the extent to which the individual elements of each class member's claim *is capable of proof at trial* through evidence that is common to the class rather than individual to its members.
       - Plaintiffs' burden at the class certification stage is not to *prove* each element of the claim, although in order to prevail on the merits each class member must do so through classwide or individual proof
       - Courts must formulate some prediction as to how specific issues will play out at trial in order to determine whether common or individual issues predominate in a given case
     - Predominance does not preclude individual evidence at trial—it just precludes class certification if classwide proof does not predominate
  2. *Superiority*: Class action is superior to other means of adjudicating the claims

[1] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (citation omitted).
[2] *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 192 (3d Cir. 2020).

Rule 23(b)(3) class actions

- Application in antitrust cases
  - Almost all antitrust class actions are brought as Rule 23(b)(3) actions
  - Primary focus on the *predominance* inquiry
    - Recall that predominance requires common or "generalized proof" to dominate at trial over individualized proof with respect to the essential elements of the class claims taken as a whole
      - "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof."[1]
      - "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."[2]
    - In almost all antitrust cases, a finding of predominance will lead to a finding that a class action is the superior vehicle for adjudicating the controversy
    - Some superiority challenges, but almost never successful when predominance requirement is satisfied

[1] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks and citation omitted).
[2] *Id*. (internal quotation marks and citation omitted).

Rule 23(b)(3) class actions

- Application in antitrust cases
  - The predominance analysis requires court to predict what the specific issues will be at trial and what evidence will be presented in order to determine whether common or individual issues predominate[1]
  - Courts disaggregate the predominance analysis into three elements:[2]
    1. The existence of a violation
    2. "Impact" = Proximate cause/fact of injury/prudential standing
    3. Damages

[1] *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008); *accord In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 190 (3d Cir. 2020); Costello v. BeavEx, Inc., 810 F.3d 1045, 1059 (7th Cir. 2016).
[2] *See, e.g.,* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 665 (9th Cir. 2022) (en banc); Stromberg v. Qualcomm Inc., 14 F.4th 1059, 1065 (9th Cir. 2021); *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 270 (3d Cir. 2020); *see generally* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809-10 (2011) (observing that the predominance inquiry must begin "with the elements of the underlying cause of action").

Rule 23(b)(3) class actions

- Application in antitrust cases
  - General rules
    - Class certification should be denied in antitrust cases if common questions do not predominate on both the existence of the violation and impact (taken separately)
    - Since existence of the violation typically depends on the defendants' conduct and not the individual circumstances of class members, it is almost always provable through common proof

Rule 23(b)(3) class actions

- Application in antitrust cases
  - Named plaintiffs' theory of the case
    - The predominance question ultimately is whether the plaintiffs' proof of their theory of the case will depend predominantly on classwide proof or individualized proof at trial
    - *Query*: May a defendant challenge class certification by coming forward with evidence that the plaintiffs' theory of the case is factually wrong?
      - If so, does this require that the named plaintiffs show by a preponderance of the evidence that their theory is sustainable?

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  - Overview
    - Predominance analysis in antitrust class actions typically asks whether common proof predominates for three elements:
      1. Violation (defendants' conduct)
      2. Impact (proximate cause & fact of injury)
      3. Damages (amount of recovery)
    - In most cases:
      - Violation is almost always common
      - Impact is the main battleground.
      - Damages rarely defeats certification by itself.

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation
     - Common proof predominates when the defendants have engaged in a common course of allegedly unlawful conduct toward the putative class members (e.g., fixing prices)
       - Whether the defendants violated the law is almost always a common question subject to generalized proof
       - Some courts find that the predominance element is satisfied simply by the allegation of a common price-fixing conspiracy
     - Since the existence of a violation goes to what the defendants did, common proof will predominate over individualized proof as long as the class is defined in a way that the putative class members would individually have claims against the defendants with respect to the challenged conduct
       - "Indeed, if each class member pursued its claims individually, the class member would have to prove the same antitrust violations using the same documents, witnesses, and other evidence."[1]

[1] Dial Corp. v. News Corp., 314 F.R.D. 108 (S.D.N.Y. 2015), *amended*, No. 13CV6802, 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016)

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation (con't)
     - Almost never contested by defendants in per se cases
       - Sometimes defendants will argue that there were multiple conspiracies and not an overarching conspiracy, so that different putative class members would be injured (if at all) by different conspiracies
       - But the question of whether there is an overarching conspiracy is a common question, so as long as the plaintiffs can demonstrate a method of common proof to show an overarching conspiracy at trial predominance will be satisfied
     - Time period of conspiracy
       - In many cases, there will be no dispute over the time period during which the alleged conspiracy existed
         - This is often the case in follow-on private class actions where the DOJ's criminal case established the boundaries of the conspiracy
         - In other cases, however, it may be necessary to show whether and when the conspiracy existed
     - Rule of reason cases can be problematic
       - To establish a rule of reason claim, the plaintiff must affirmatively show that there is an *anticompetitive effect* in a *relevant market*
       - So, for example, predominance may be defeated when anticompetitive effect must be proven in multiple different relevant markets

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation (con't)
     - Good illustrations
       - *In re* Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *4-*5 (N.D. Cal. Nov. 14, 2018) (reviewing evidence in light of defendants' challenge that although the existence of conspiracy is a common question, it is not provable through classwide proof)
       - DeSlandes v. McDonald's USA, LLC, No. 17 C 4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) (denying certification of a nationwide class of McDonald employees challenging a no-hire provision in the franchise agreement where the provision was subject to rule of reason scrutiny and anticompetitive effect would have to be prove in "hundreds or thousands" of local relevant markets)
       - *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *8-*11 (N.D. Ill. May 27, 2022) (reviewing in detail expert evidence on the whether and when there existed a "structural break" in the long-term production trend in a highly concentrated industry to support other evidence of a price-fixing conspiracy)

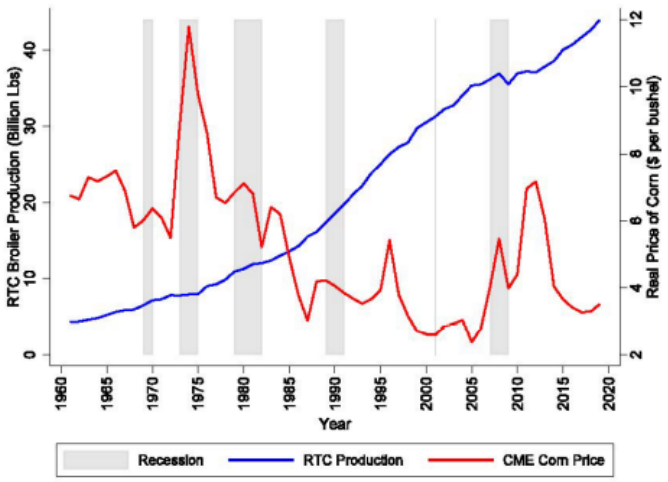
Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation (con't)
     - Good illustrations: *Broiler Chicken* "structural break" analysis[1]
       - *Claim*: Purchasers of broiler chickens allege that broiler producers conspired to raise prices by reducing production
         - *Broiler chickens* are chickens raised for their meat
       - *Procedural posture*: In a motion for class certification, the court accepted the Direct Plaintiffs expert's "structural break" analysis as providing a means of classwide proof of whether and when the alleged conspiracy existed
         - The "structural break" analysis examined the long-term production trend in the highly concentrated broiler chicken industry to see whether there was a statistically significant downward break in the production trend supporting a finding of the existence and duration of the alleged conspiracy
         - The "structural break" analysis addressed two questions—
           1. Was there a change in the pattern or growth in supply over the period of analysis, and
           2. If so, when was the most likely date on which this change occurred
       - Methodology
         - Plot production against time and address the trend line

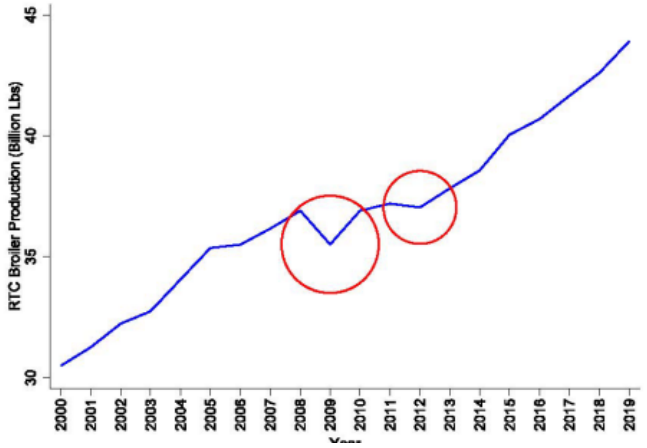
[1] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *6-*11 (N.D. Ill. May 27, 2022).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation
     - *Example*: *Broiler Chicken* "structural break" analysis (con't)
     - *Evidence*:
       1. Prior to 2008, broiler production had increased at a relatively consistent rate for many years

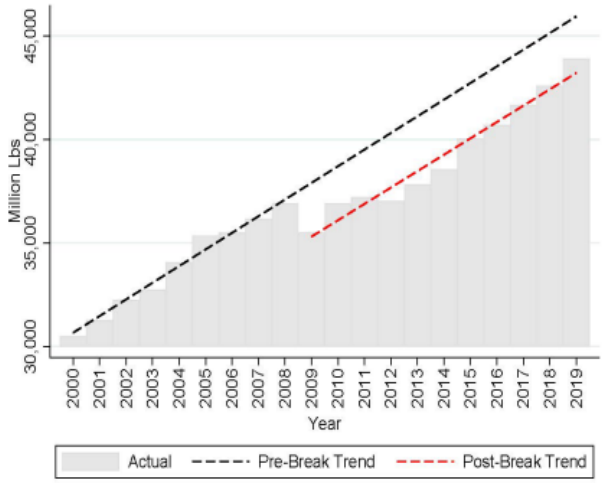


       2. In 2009-2012 and 2008-2019, the rate of production decreased significantly



Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation
     - *Broiler Chicken* "structural break" analysis (con't)
     - *Evidence*:
       3. The "break" in the production trend was especially pronounced in 2008-2019



- *Court:*

> "[Direct Plaintiffs' expert] Carter's analysis confirms what is readily apparent from the data [the three charts]—after steady increases since at least 1960, Broiler supply decreased in 2008 and 2012, and the rate of supply increase decreased between 2008 and 2019 relative to the historical trend from 2000 to 2020. This data is the foundation of Plaintiffs' claims, and the Court focused on this apparently anomalous occurrence in denying Defendants' motions to dismiss and finding that Plaintiffs had plausibly alleged Defendants violated the Sherman Act. From the Court's perspective—which has not changed upon reviewing the briefing on these motions and hearing the testimony—this case is about determining whether collusive conduct by Defendants caused this historic decrease in Broiler production.[1]

[1] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *8 (N.D. Ill. May 27, 2022) (record citations omitted].

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation (con't)
     - Good illustrations: *Broiler Chicken* "structural break" analysis
       - Defendants' challenge: Reliability
         - Defendants did not dispute—
           - The fact that the rate of Broiler production decreased significantly between 2008 and 2019, relative to historical trends, *or*
           - Structural break analysis is a widely used and reliable methodology
         - Rather, Defendants' expert attacked Carter's structural break test for *reliability*, arguing that it was improper because it analyzed the supply of broilers in the market as a whole without regard to whether the overall market production statistics are reflected in production by each individual defendant
         - Defendants' analysis showed that not all defendants cut supply to the same extent and some did not even cut supply at all. Moreover, to the extent there were "structural breaks" in any individual defendant's production, they did not match the breaks identified by Carter.
         - *Query*: If the defendants accepted that there was a break in the production trend in 2008 that reduced supply below levels that would have existed if the pre-2008 trend continued, why did defendants' attack the reliability of the plaintiffs' structural break analysis?
           - *WDC*: Think of the weight the jury might give to this analysis at trial

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  1. Existence of a violation (con't)
     - Good illustrations: *Broiler Chicken* "structural break" analysis
       - The court's response: Defendants' attack rejected

> [E]vidence that Defendants did not identically manage their Broiler production during the class period does not eliminate the plausibility of the claim that they colluded to decrease supply. True, it can reasonably be argued that this is evidence that at least some defendants were not part of the conspiracy, or even that there was no conspiracy at all. But that is an argument for summary judgment or trial. Such evidence does not conclusively show a lack of a conspiracy to decrease supply and increase the market price such that Carter's opinion should be rejected or class certification denied. Using overall market trends as opposed to isolated defendant conduct is a reasonable approach because fundamental economic theory says that market supply directly affects the market price. Whether all Defendants' actions were precisely in lock step does not change the fact that supply decreased in historically unusual fashion from 2008 to 2019. Carter demonstrates that this decrease in supply is statistically significant. The fact the Johnson may be able to demonstrate that certain defendants had greater or lesser responsibility for the market movement does not change the fact that there is evidence that market supply decreased as Plaintiffs allege and Carter confirms. And thus, it is not a reason to reject Carter's opinion or deny class certification.[1]

[1] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 1720468, at *8 (N.D. Ill. May 27, 2022) (record citations omitted].

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  2. "Impact"
     - Impact = existence of antitrust injury in fact + proximate cause
     - Typically the main battleground in antitrust class certification
       - Impact question: In the but-for world—i e., where defendants did not commit the alleged violation—would the defendants have charged lower prices to the class members?
       - Predominance question: Can impact be proved through classwide proof?[1]
       - Named plaintiffs typically rely heavily on expert economic testimony to show a classwide means of proving impact

[1] *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252-53 (D.C. Cir. 2013) ("Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact. "); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  2. "Impact" (con't)
     - A critical distinction:

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification 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.[1]

     - The "Bogosian short cut"[2]
       - Historically, some courts applied a rebuttable presumption that an illegal price-fixing scheme impacts all purchasers
       - This presumption has been significantly undermined by recent cases
       - Now courts require some additional evidence of class-wide impact[3]

[1] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008).
[2] Bogosian v Gulf Oil Co., 561 F.2d 434, 455 (3d Cir. 1977); *accord In re* Linerboard Antitrust Litig., 305 F.3d 145, 151 (3d Cir. 2002).
[3] *See, e.g.*, American Seed Co., Inc. v. Monsanto Co. 271 F. App'x 138, 140-41 (3d Cir. 2008).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  2. "Impact" (con't)
     - Proof of impact using regression analysis
       - To show that impact can be shown using classwide proof, expert economists typically use multiple regression analysis
         - At the class certification stage, the proper question is whether the proffer expert testimony reflects a generally accepted method for determining antitrust impact
         - Multiple regression analysis is a widely used econometric technique
         - Multiple regression analysis can be used to estimate the *but-for price* (the price that would have existed in the absence of the alleged unlawful restraint). allowing the economist to test whether prices during the class period on average were higher than the but-for benchmark
         - If the expert performed the regression analysis in a reliable and professionally accepted manner, the evidence should be admissible as a classwide method of proving impact
       - NB: It is critical to remember that the question at the class certification stage is whether there is a method of classwide proof of impact, *not* whether the evidence proves impact
         - Accordingly, the criterion for the evidence is *admissibility*, not *correctness*
         - The quality of the data or whether the regression model included all the proper variables do not go not to the admissibility of expert testimony but rather to the weight and probative value of the evidence

[1] Regression analyses are almost always introduced into the certification record by an economist. The use of expert evidence in class certification proceedings is treated in detail below.

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  2. "Impact" (con't)
     - Proof of impact using regression analysis
       - Moreover, some care is required since regression analysis will only estimate *average prices*
         - Say, for example, the plaintiff's expert economist uses regression analysis to estimate the "but for" price that would have been charged in the absence of the challenged restraint, and opines that the difference between this average price and the higher average price actually paid by class members demonstrates impact on a classwide basis
         - BUT, for example, if some class members actually paid a price lower than the "but for" average price for the class as a whole, the regression analysis cannot be used to show that these class members sustained impact
         - Typically, the burden is on the defendants to produce evidence that shows that may be faulty in the classwide proof of impact for at least some class members. The named plaintiff then has the burden of persuasion of showing the efficacy of the proof by a preponderance of the evidence in light of the defendant's evidence.[1]

[1] For an illustration, see *In re* Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 192-94 (3d Cir. 2020) (vacating class certification order).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  2. "Impact" (con't)
     - Indirect purchaser class actions (under supplemental jurisdiction)
       - Courts generally require indirect purchaser plaintiffs to face a "two-fold" burden that distinguishes their certification requirements from direct purchaser classes—
         - must show that all or nearly all of the original direct purchasers of ODDs bought at inflated prices *and*
         - must also show those overcharges were passed through all stages of the distribution chain[1]
       - The requirement to prove pass-through damages using common evidence has been the fatal obstacle for most indirect purchaser class certification attempts[2]

[1] *In re* Optical Disk Drive Antitrust Litig., 303 F.R.D. 311 (N.D. Calif. 2014); *see In re* Graphics Processing Units Antitrust Litig., 253 F.R.D. 478 (N.D. Calif. 2008).
[2] *But see In re* TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 583 (N.D. Cal. 2010), *amended in part*, No. M 07-1827 SI, 2011 WL 3268649 (N.D. Cal. July 28, 2011) (granting certification to indirect purchaser class).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  2. "Impact" (con't)
     - Good illustrations of impact analysis
       - Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc) (addressing whether a pooled regression that measures only an average overcharge is sufficient where there may be a substantial percentage of uninjured class members)
       - Miami Prods. & Chem. Co. v. Olin Corp., No. 1:19-CV-00385 EAW, 2024 WL 5116568 (W.D.N.Y. Dec. 16, 2024) ((denying class certification in antitrust action after detailed scrutiny of plaintiffs' regression-based damages model, holding that reliance on list prices and averages could not reliably show classwide overcharge and masked substantial numbers of uninjured class members)
       - *In re* Keurig Green Mountain Single-Serve Coffee Antitrust Litig., No. 14-MC-2542 (VSB), 2025 WL 3240044 (S.D.N.Y. Nov. 20, 2025) (denying class certification in antitrust action where plaintiffs' aggregate damages model, relying on list prices and average overcharges, was inadequate to demonstrate classwide antitrust impact and risked including substantial numbers of uninjured class members)
       - *In re* Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *5-*8 (N.D. Cal. Nov. 14, 2018) (granting in part and denying in part motions to exclude damages experts and discussing in detail whether plaintiffs' regression-based overcharge and pass-through models could reliably show classwide impact and damages at the class certification stage)

Rule 23(b)(3) class actions

- Impact: Constitutional standing requirements for class members
  - Traditional pre-*TransUnion* rule
    - Named plaintiffs must have Article III standing
    - Absent class members need not independently demonstrate standing
    - *Rationale*: Absent members bound by adequacy of representation, not as parties
  - Supreme Court rules after *TransUnion* (2021)[1]
    - Named plaintiff must have Article III standing
    - Every class member must have Article III standing to recover individual damages
    - But *TransUnion* expressly reserved whether every class member must demonstrate standing before class certification
    - The Supreme Court still has not resolved that certification stage question
      - The issue was presented in Laboratory Corp. of America Holdings v. Davis (2025), but the Court dismissed certiorari as improvidently granted[2]
  - Implications
    - In damages classes, absent member standing now overlaps with typicality and, especially, predominance/manageability

[1] TransUnion LLC v. Ramirez, 594 U.S. 413, 430-31 & n.4 (2021).

[2] 605 U.S. 327 (2025) (per curiam); *id*., Kavanaugh, J., dissenting (stating question presented as whether a federal court may certify a Rule 23 damages class that includes both injured and uninjured class members)

Rule 23(b)(3) class actions

- Impact: Constitutional standing requirements for class members
  - Circuit split on certifying classes with uninjured members
    - More permissive approach
      - *Fifth Circuit*: Certification is not precluded simply because a class may include persons who were not injured by the defendant's conduct
        - *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009).
      - *Seventh Circuit*: Certification is not defeated merely because some class members may be uninjured; the problem arises when it is apparent that the class contains "a great many" uninjured persons
        - *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677-78 (7th Cir. 2009); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824-25 (7th Cir. 2012)
      - *Ninth Circuit*: No per se de minimis rule: the question is whether common issues still predominate under a rigorous Rule 23 analysis
        - *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 667-69, 682 (9th Cir. 2022) (en banc).
      - *Eleventh Circuit*: a court need not exclude every possibly uninjured member before certification, but if a large portion of the class may be uninjured and sorting that out requires individualized inquiry, predominance may fail
        - *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273, 1276-77 (11th Cir. 2019)

Rule 23(b)(3) class actions

- Impact: Constitutional standing requirements for class members
  - Circuit split on certifying classes with uninjured members
    - More restrictive approach
      - *First Circuit*: Certification fails where plaintiffs lack a common method to separate more than a very small number of uninjured members; contested class-member affidavits, without a workable plan for adjudicating challenges, are not enough.
        - In re Asacol Antitrust Litig., 907 F.3d 42, 53-58 (1st Cir. 2018)
      - *Third Circuit (mixed):* Absent class members need not establish Article III standing as a condition of justiciability, but if individualized showings of standing are likely to be substantial, the district court must consider whether they defeat predominance
        - Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362-68 (3d Cir. 2015); Huber v. Simon's Agency, Inc., 84 F.4th 132, 157-66 (3d Cir. 2023).
      - *D.C. Circuit*: Plaintiffs must have common proof of injury and causation sufficient to satisfy predominance; on the facts of Rail Freight, a model showing 12.7% (2,037) uninjured class members, with no further common way to separate them, did not suffice.
        - *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252-53 (D.C. Cir. 2013); 934 F.3d 619, 624–25 (D.C. Cir. 2019).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  3. "Measurable damages"
     - Hornbook law
       - Recall the different judicial attitudes on fact of injury (impact) and amount of damages
       - That damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat Rule 23(b)(3) class certification[1]
         - *Query*: What does an "individual basis" mean? Individually but using a common formula? What if there is no formula?
       - In any event, proof of damages must still be considered in deciding whether questions susceptible to generalized proof outweigh individual issues
     - Individual questions can be minimized if not eliminated if there is a generally applicable formula for calculating damages
       - Typically addressed by plaintiffs' expert simultaneously with impact
         - In other words, if plaintiffs' expert uses a formulaic approach to impact, then that same approach will likely (by design) provide a method of estimating damages
       - Usually a common per unit overcharge multiplied by the number of units the class member purchased

[1] *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  3. "Damages"
     - *Comcast* requirement
       - A model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury

> We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).[1]

[1] Comcast v. Behrend, 569 U.S. 27, 35 (2013).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  3. "Damages"
     - *Comcast*
       - The plaintiff submitted four theories of antitrust impact. The district court rejected three of the theories as unsuitable for class action treatment and limited the class to the remaining theory.
       - The plaintiff also submitted regression model to determine a "but for" price and hence create a classwide formula for damages. The model, however, did not disaggregate the remaining operative theory of impact from the three rejected theories.
       - The Supreme Court, in a 5-4 decision, rejected the damages model as a method of classwide proof of damages
         - The Court held that a court's determination regarding what a statistical regression model may prove or is capable of proving is a question of law and not a question of fact, and by implication subject to de novo review on appeal
         - The dissent argued that what a regression model is capable of proving is a question of fact and by implication subject to the clearly erroneous rule[2]

[1] Comcast v. Behrend, 569 U.S. 27, 35 n.5 (2013); accord Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 664 (9th Cir. 2022) (en banc).
[2] *Id*. at 38, 47-48 (Ginsberg and Breyer, JJ., dissenting).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  3. "Damages"
     - "Aggregate damages"
       - Some courts—most notably the Third Circuit—hold that—
         - a method of common proof of aggregate class-wide damages is sufficient to show predominance on damages, *and*
         - Leaving the allocation of individual damages to a post-trial court-approved plan of allocation among class members[1]
       - In *Suboxone*, the Third Circuit explained:

> [T]he Purchasers' model does not measure how Reckitt's [alleged monopolization] scheme harmed each class member and recognizes that there could be differences among the class members concerning the precise damages they suffered. Individualized determinations, however, are of no consequence in determining whether there are common questions concerning liability. Rather, we need be assured only that common issues predominate. Such is the case here because the Purchasers' theory of injury and damages is provable and measurable by an aggregate model relying on class-wide data. Although allocating the damages among class members may be necessary after judgment, "such individual questions do not ordinarily preclude the use of the class action device." Thus, the District Court correctly found that common issues predominate.[2]

[1] *See, e.g.*, *In re* Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig., 967 F.3d 264, 271-72 (3d Cir. 2020); *In re* Modafinil Antitrust Litig., 837 F.3d 238, 262 (3d Cir. 2016).
[2] *Suboxone*, 967 F.3d at 272.

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  3. "Damages"
     - Ninth Circuit rule

> It is well-established that "damage calculations alone cannot defeat certification," Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010), and "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013).[1]

[1] In re Capacitors Antitrust Litig. (No. III), No. 14-CV-03264-JD, 2018 WL 5980139, at *3 (N.D. Cal. Nov. 14, 2018).

Rule 23(b)(3) class actions

- Antitrust predominance analysis
  3. "Damages"
     - Good illustrations
       - *In re* Capacitors Antitrust Litig., (No. III), No. 17-MD-02801-JD, 2018 WL 5980139, at *9 (N.D. Cal. Nov. 14, 2018)

Rule 23(b)(3) class actions

- Superiority
  - Requirement
    - Class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy"[1]
      - Class action must be the most "fair and efficient" method of resolving this case
    - Rule 23(b)(3) sets forth four nonexclusive factors to consider:
      - The class members' interests in individually controlling the prosecution or defense of separate actions;
      - The extent and nature of any litigation concerning the controversy already begun by or against class members;
      - The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
      - The likely difficulties in managing a class action.
    - Manageability
      - Is usually the primary focus of the superiority inquiry
      - But courts are reluctant to deny class certification on the sole ground that it would be unmanageable[2]

[1] Fed. R. Civ. P. 23(b)(3).

[2] *But see In re* Fresh Del Monte Pineapples Antitrust Litig., No. 1:04-md-1628 (RMB), 2008 WL 5661873 (S.D.N.Y. Feb. 20, 2008) (certifying direct purchaser class but denying certification to indirect purchaser class for lack of manageability).

Rule 23(b)(3) class actions

- Opt-outs
  - Rule 23(c)(2)(B)[1]
    - Requires when a Rule 23(b)(3) class is certified, the accompanying notice must state, among other things, that "the court will exclude from the class any member who requests exclusion"
    - This right is known as an "opt-out" right
  - Implications
    - Class member sthat opt out are no longer members of the class
      - They obtain no benefits from any success by the class in litigation or settlement
      - They are not precluded from bringing their own claims (either individually or in a class action of out-outs) against the defendants in the original action regardless of the result in that action
      - The statute of limitations is tolled for them from the date the original putative class action was filed until the date they were excluded from the class

[1] Fed. R. Civ. P. 23(c)(2)(B).

Rule 23(b)(3) class actions

- Opt-outs
  - Practice
    - Business calculus
      - Class members opt out when they think that they can obtain a greater recovery in subsequent "opt-out litigation"—either in settlement or by going to trial—than they can if they stayed in the original class action
      - Opt-outs may proceed individually or create their own class action of opt-outs from the original class action
    - Becoming more common
      - In the *Liquid Crystal Display (LCD) Panels* antitrust litigation, more than 75 companies—including Apple, Best Buy, Dell, Costco, and Kodak—opted out of a class action and pursued direct recovery through individual settlements and, for several plaintiffs, trials
      - In the *Interchange* antitrust case against Visa and MasterCard, roughly 8000 retailers opted out of the class

[1] Fed. R. Civ. P. 23(c)(2)(B).

Rule 23(b)(3) class actions

- Opt-outs
  - Practice
    - Major problem for the original class and defendants
      - As class members increasingly opt out, the benefits of settlement decrease to the defendants, since they will still have bear the costs and risks of defending the opt-out litigation
      - To mitigate this problem, the settlement agreement in the original class action may provide that the defendants will further compensate the original class to make up any per capita difference between the original settlement and a subsequent opt-out settlement

[1] Fed. R. Civ. P. 23(c)(2)(B).

Class Action Fairness Act (CAFA)

- Expansion of federal diversity to certain class actions[1]
  - Provides that federal district courts have original jurisdiction over any class action in which
    1. the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs,
    2. and—
       - any member of a class of plaintiffs is a citizen of a State different from any defendant;
       - any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
       - any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state, and
    3. the number of members of all proposed plaintiff classes in the aggregate is less than 100

[1] 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(2).

Class Action Fairness Act (CAFA)

- Expansion of federal diversity to certain class actions (con't)
  - Purpose
    - A primary purpose in enacting CAFA was to open the federal courts to corporate defendants out of concern that the national economy risked damage from a proliferation of meritless class action suits[1]
  - Prior to CAFA, federal courts had diversity jurisdiction over class actions only if:
    - *Complete diversity*: No named plaintiff could be a citizen of a state in which a defendant was also a citizen, and
    - *Amount in controversy*: Greater than $75,000 ((which could not be created by aggregating the claims of the named plaintiffs or the putative plaintiff class)
  - In practice, CAFA provides a means of removing a state court class action that the plaintiffs would prefer to keep in state court to federal court
  - *Limitations*: In some situations, courts—
    - Have discretion to decline exercising CAFA diversity jurisdiction[2]
    - Are required to decline exercising CAFA diversity jurisdiction[3]

[1] *See* Bell v. Hershey Co., 557 F.3d 953, 957 (8th Cir. 2009).
[2] 28 U.S.C. § 1332(d)(3).
[3] *Id*. 1332(d)(4).

Class Action Fairness Act (CAFA)

- Implications for antitrust class actions
  - Prior to CAFA, class actions alleging claims under state antitrust law—typically indirect purchaser claims after *Illinois Brick*—rarely could qualify for federal diversity jurisdiction—
    - Often lacked complete diversity
    - Almost always fell short of the amount in controversy requirement
  - After CAFA, fairly easy for class actions alleging state antitrust claims to qualify for diversity jurisdiction
  - After some state antitrust law plaintiffs may prefer to keep their action in state court, CAFA provides defendants a means to remove many of these actions to federal court
    - State plaintiffs sometimes will limit the class definition and/or limit the class period to avoid surpassing the $5 million CAFA amount in controversy threshold and so avoid be removed to federal court
    - A state indirect purchaser action removed to federal court is likely to be consolidated by the MDL Panel with the federal direct purchaser actions

Certification record

- "Evidentiary proof"
  - The party seeking class certification must satisfy through *evidentiary proof*, and not just through pleading, that all of the requirements of Federal Rule of Civil Procedure 23 have been met[1]
    - This means that the plaintiff "must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[2]
    - This often means that the court must resolve issues that also bear on the merits of the claim, but only if those issues "overlap" with class certification issues[3]

[1] Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013) ("The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)."). Presumably, the same rule applies for the rule 23(a) requirements.
[2] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (emphasis in original).
[3] *Comcast*, 569 U.S. at 33-34.

Certification record

- "Admissible" evidence
  - *Query*: After *Comcast*, may the district court consider only admissible evidence in deciding whether to certify a class?
    - Yes, as to all materials in the certification record:
      - Fifth Circuit
        - Unger v. Amedisys Inc., 401 F.3d 316, 319 (5th Cir. 2005) ("[W]e hold that a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification.").
      - Ninth Circuit
        - Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 665 (9th Cir. 2022) (en banc):

> In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any admissible evidence. *See Tyson Foods*, [Inc. v. Bouaphakeo, 577 U.S. 442,] 577 U.S. at 454-55 [(2016)] (explaining that admissibility of evidence at certification must meet all the usual requirements of admissibility and citing to Rules 401, 403, and 702 of the Federal Rules of Evidence).

        - WDC: This is a very aggressive reading of *Tyson Foods*.
        - *Olean* reverses a line of Ninth Circuit cases holding that the certification record is not limited to materials admissible in evidence[1]

[1] *See, e.g.,* Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1004-06 (9th Cir. 2018) (internal citation omitted).

Certification record

- "Admissible" evidence
  - *Query*: After *Comcast*, may the district court consider only admissible evidence in deciding whether to certify a class?
    - Yes, at least with respect to expert evidence:
      - Second Circuit
        - *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129 (2d Cir. 2013) (holding that the district court properly "considered the admissibility of the expert testimony" at the class certification stage, but declining to decide exactly "when a *Daubert* analysis forms a necessary component of a district court's rigorous analysis") (emphasis added);
      - Third Circuit
        - *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015) ("We join certain of our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in Daubert.")[1]
      - Seventh Circuit
        - Am. Honda Motor Co. v. Allen, 600 F.3d 813, 817 (7th Cir. 2010) (vacating the district court's class certification order because it "fail[ed] to [resolve clearly] the issue of ... admissibility before certifying the class" and the expert testimony in question failed to satisfy *Daubert*)
        - Two other circuits have required expect evidence to be admissible in unpublished rulings
          - *In re* Carpenter Co., No. 14-0302, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014); Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011)

[1] For a detailed analysis of why the certification record should be limited in all respects to admissible evidence, see Judge Porter's concurrence in Allen v. Ollie's Bargain Outlet, Inc., 37 F.4th 890, 904-09 (3d Cir. 2022) (Porter, J., concurring).

Certification record

- "Admissible" evidence
  - Query: After Comcast, may the district court consider only admissible evidence in deciding whether to certify a class?
    - Yes, at least with respect to expect evidence:
      - Eleventh Circuit:
        - See Sher v. Raytheon Co., 419 F. App'x 887, 890-91 (11th Cir. 2011) ("Here the district court refused to conduct a Daubert-like critique of the proffered experts's qualifications. This was error.")

Certification record

- "Admissible" evidence
  - *Query*: After *Comcast*, may the district court consider only admissible evidence in deciding whether to certify a class?
    - No, at least as to non-expert materials
      - Sixth Circuit
        - Lyngaas v. Ag, 992 F.3d 412, 428-29 (6th Cir. 2021) ("We hold, as have the Eighth and Ninth Circuits, that such 'evidentiary proof' need not amount to admissible evidence, at least with respect to nonexpert evidence.")
      - Eighth Circuit
        - *In re* Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 611, 614 (8th Cir. 2011) (holding that a district court need not "decide conclusively at the class certification stage what evidence will ultimately be admissible at trial").

> As class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty. Because a decision to certify a class is far from a conclusive judgment on the merits of the case, it is "of necessity . . . not accompanied by the traditional rules and procedure applicable to civil trials."[1]

[1] *In re* Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (internal citation omitted; quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)).

Certification standards

- Historical tendencies
  - Favor antitrust class actions, especially in horizontal price-fixing cases
    - Prerequisites for class certification are "readily met in certain cases alleging . . . violations of the antitrust laws"[1]
    - "[B]ecause of the important role that class actions play in the private enforcement of the antitrust statutes, courts resolve doubts about whether a class should be created in favor of certification."[2]
    - "Antitrust claims are well suited for class actions."[3]
    - Class actions "play a particularly vital role in the private enforcement of antitrust [laws]."[4]

[1] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997).
[2] *In re* Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 378 (S.D.N.Y. 1996).
[3] *In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 238 (E.D.N.Y. 1998).
[4] *In re* Tableware Antitrust Litig., 241 F.R.D. 644, 648 (N.D. Cal. 2007).

Certification standards

- The history of the "rigorous analysis" requirement
  - Introduced in 1982
    - In *Falcon*, the Supreme court held that the trial court may certify a class only after a "rigorous analysis" that each of the requirements of Rule 23 have been satisfied[1]
  - BUT countervailing qualifications quickly swallowed the rule:
    - View that courts must accept allegations in the complaint as true
      - *Eisen* said that courts did not have authority to conduct a preliminary inquiry into the merits[2]
      - Most predicate facts for class certification are also relevant to the merits
    - Need to show only there is a method of common proof, not make the proof
      - "At this stage in the proceedings, the Court only must find that plaintiffs have set forth a valid methodology for proving antitrust impact common to the class, not that they will prove it."[3]
    - View that impact could be presumed from the allegations of horizontal price-fixing[4]

[1] General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982).
[2] Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974).
[3] *In re* Magnetic Audiotape Antitrust Litig., No. 99 CIV. 1580(LMM), 2001 WL 619305, at *6 (S.D.N.Y. June 6, 2001).
[4] *See* Bogosian v. Gulf Oil Co., 561 F.2d 434 (3d Cir. 1977).

Certification standards

- Historical tendencies
  - Contributing factors
    - View that courts could not engage in weighing conflicting expert evidence ("battle of the experts")
      - Weighing of evidence committed to trier of fact
    - View that class actions were to be favored, so that the quantum of proof on the Rule 23 elements were corresponding weak
      - Second Circuit, for example, required only "some showing" of compliance with the Rule 23 requirements and accepted plaintiff's expert reports as long as they were not "fatally flawed"
  - Today, the *Falcon* "rigorous analysis" requirement is fully accepted even if it requires some considerations of the merits

> [C]ertification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[1]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (quoting General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982)); *accord* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 465-66 (2013); Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

Certification standards

- Modern rules
  - Courts must conduct an examination of the certification record and not merely accept complaint allegations as true[1]

> "Class certification is an especially serious decision, as it 'is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'"[2]

[1] *See, e.g.*, In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).
[2] *In re* Constar Int'l Inc. Sec. Litig., 585 F.3d 774, 780 (3d Cir. 2009) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001)).

Certification standards

- Modern rules
  - *Wal-Mart* (2011)
    - Makes clear that the party seeking certification must *affirmatively demonstrate* on the record that each requirement of Rule 23 is satisfied[1]
    - "Rigorous analysis" increasingly requires:
      - Evidence (e.g., affidavits, documents, or testimony) sufficient to make a determination that each Rule 23 requirement has been met , and
      - Resolution of all legal or factual disputes relevant to Rule 23 by a preponderance of the evidence to make findings that each Rule 23 requirement is met or is not met
    - *Halliburton* reading of the *Walmart* rule:

> [P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3). . . . [Plaintiffs must carry their burden of proof] before class certification.[2]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351-52 (2011); *see In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013).
[2] Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 275-76 (2014) (emphasis in original); *applied* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 664 (9th Cir. 2022) (en banc).

Certification standards

- Modern trends
  - Courts must weigh evidence (including expert evidence) to resolve factual disputes on Rule 23 requirements[1]
    - Obligation to make determinations on Rule 23 elements exists even if—
      - the element is identical to a merits issue, *or*
      - the determination involves issues of credibility
    - But—
      - "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[2]
      - Factual findings are only preliminary and not binding on the merits

[1] *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 249 (D.C. Cir. 2013); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).
[2] Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466 (2013).

Certification standards

- Modern trends
  - Courts of appeal increasingly requiring district courts that grant certification to make "findings"
    - Two types of findings:
      - Written findings that the requirement of Rule 23 have been satisfied
      - Written findings of the factual predicates of the findings that the Rule 23 requirements have been satisfied
        - BUT district court's findings, while conclusive with respect to class certification, do not bind the fact-finder on the merits
    - Basis
      - Arguably required by Rule 23 (especially in Rule 23(b)(3) class actions)
      - Necessary for appellate review
        - Some courts of appeal hold that the failure to provide findings and a reasoned analysis is grounds for summary reversal

Certification standards

- Modern trends
  - Modern courts that have addressed the issue require require plaintiffs to show predicate facts by a "preponderance of the evidence"[1]
    - That is, considering all materials in the class certification record, "the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23"[2]
    - An important observation:

> Generally speaking, the evolution . . . of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.[3]

[1] *See, e.g.*, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 664-65 (9th Cir. 2022) (en banc); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008).

[2] *Hydrogen Peroxide*, 552 F.3d at 320.

[3] Addington v. Texas, 441 U.S. 418, 423 (1979) (emphasis added); *accord* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 557 (2014); Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983); *applied* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 664 (9th Cir. 2022) (en banc).

Certification standards

- Modern trends
  - Still not permitted
    - Analysis of the merits to determine whether the case is sufficiently meritorious to warrant class action treatment, or
    - In the language of Rule 23, whether the strength of the case on the merits makes class action treatment superior to other means of resolution

[1] *See, e.g.*, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 664-65 (9th Cir. 2022) (en banc); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008).
[2] *Hydrogen Peroxide*, 552 F.3d at 320.

Certification standards

- No preclusive effect of certification factual findings on merits
  - The district court's findings, while conclusive with respect to class certification, do not bind the fact-finder on the merits[1]
    - In this sense, factual findings in a class certification proceeding are analogous to factual findings in a preliminary injunction proceeding

[1] *See, e.g.*, Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 229 (5th Cir. 2009); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 24 (1st Cir. 2008); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 38 (2d Cir. 2006), *decision clarified on denial of reh'g* 483 F.3d 70 (2d Cir. 2007); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004).

Expert testimony in class certification

- Usually an essential part of the evidence on both sides on impact and damages
  - But impact can also be shown through nonexpert evidence
  - Indeed, sufficient lay evidence can carry the day on impact even if the expert testimony is rejected by the court

Expert testimony in class certification

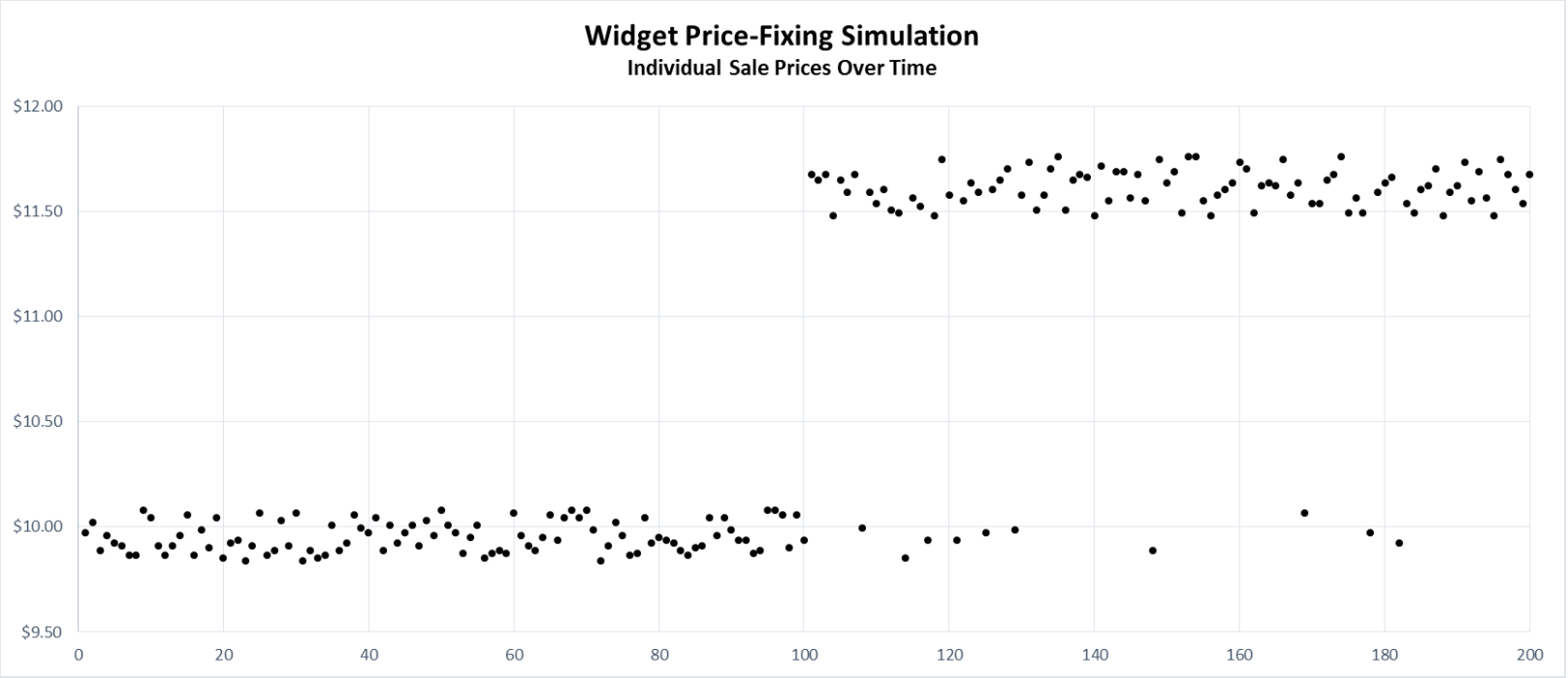
- Usual routine
  - Plaintiff's expert
    - Proposes a method of generalized proof
    - Usually appeals to standard damages methods (e.g., "before-and-after", yardstick)
    - In most cases, invokes regression analysis to take into account individual factors
      - Courts typically reject averaging techniques that suppress individual treatment (e.g., average overcharge to show impact or damages
  - Defendant's expert
    - Attacks the reliability of plaintiff expert's evidence: May contend that—
      - Expert failed to show that proposed methods can provide common proof in the specific circumstances of the case
      - Expert applied methods too superficially to be reliable
    - Proposes own analysis to show that there is either—
      - No reliable classwide method of proof to show impact and damages and therefore individual questions predominate, *or*
      - A proper classwide analysis shows that there is no impact or damages (rarely used)

Expert testimony in class certification

- Typical methods of common proof
  - "Before and after" models
    - Compares actual prices over time in the market before (or after) the alleged collusion with actual prices in the market during the collusive period
    - Assumes that prices in the collusive period in the absence of price-fixing can be estimated using the factors that determined the prices in the nonconclusive period
  - Yardstick models
    - Compares actual prices in the market with the alleged collusion with actual prices in a "comparable" market that did not experience the alleged collusion
    - Assumes that prices in the collusive market in the absence of price-fixing can be estimated using the factors that determined the prices in the nonconclusive market
    - *Key question*: How a pick a comparable nonconclusive market to act as the benchmark?

Expert testimony in class certification

- *Example 1*: Before and after method applied to price fixing
  - Plaintiffs allege that defendant-manufacturers to conspired to raise the markup of widgets over the cost of goods sold (COGS) from 20% in the preconspiracy period to 40% in the postconspiracy period



Expert testimony in class certification

- *Example 1*: Before and after method applied to price fixing (con't)
  - Given this theory and if we know the COGS for each sale, we can regress price against COGS in the nonconspiracy period to obtain an equation for the expected noncollusive price:

$$price_t = \alpha + \beta COGS_t + \varepsilon_t \text{ for } t = 1,...,100 \text{ (the alleged nonconspiratorial sales)}$$

$$E(price_t) = 0 + 1.2COGS_t \text{ (from running the regression equation)}$$

  - We can do the same for the conspiracy period:

$$price_t = \alpha + \beta COGS_t + \varepsilon_t \text{ for } t = 101,...,200 \text{ (the alleged conspiratorial sales)}$$

$$E(price_t) = -0.5871 + 1.4COGS_t \text{ (from running the regression equation)}$$

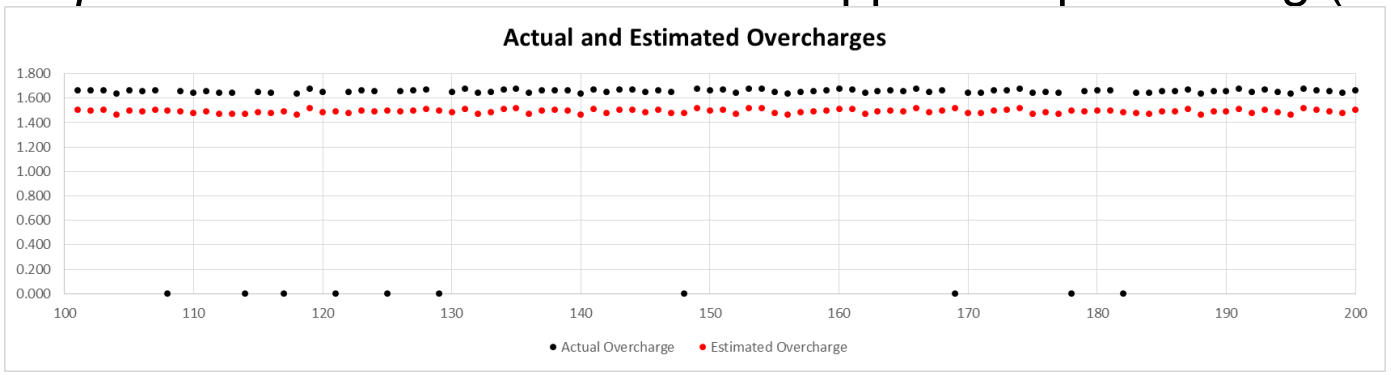
  - The difference between the expected conspiratorial price (using the first set of coefficients) and the expected nonconspiractorial price is the estimated overcharge on the sales in the conspiratorial period:

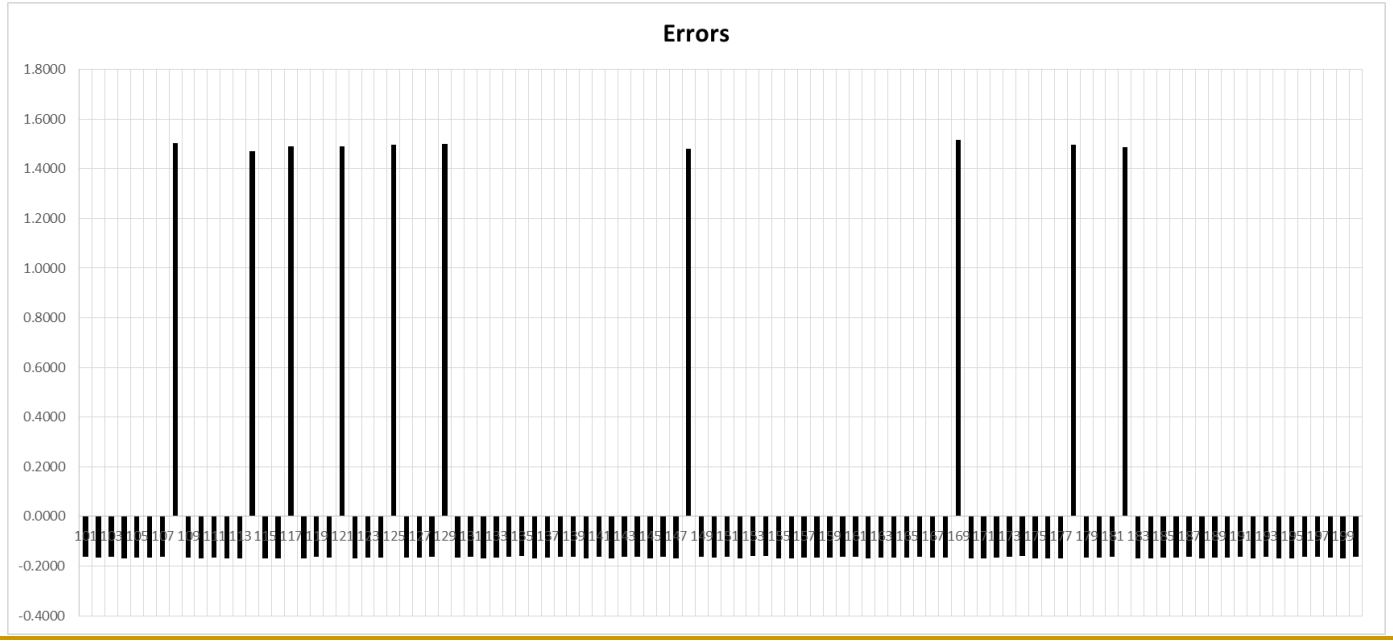
$$\begin{aligned} \mathrm{E}(\text{Overcharge}_t) &= (-0.5871 + 1.4COGS_t) - (1.2COGS_t) \\ &= -0.5871 + 0.2COGS \end{aligned}$$

    - With an average COGS = 8.3, this indicates a *positive* estimated overcharge of 1.5 (suggesting common impact)
    - The estimated overcharge equation also provides a classwide method of estimating individual damages for each class member

Expert testimony in class certification

- *Example 1*: Before and after method applied to price fixing (con't)





Expert testimony in class certification

- *Example 1*: Before and after method applied to price fixing (con't)
  - Conclusions
    - Although the average estimated overcharge is positive, the error analysis (and even visual inspection of the first chart) tells us that something is wrong
      - *Impact*: The putative class may contain members that did not suffer impact (i.e., were not individually damaged by the defendants' alleged antitrust violation)
      - *Damages*: Some putative class members have large excess estimated damages, while the damages of most putative class members are underestimated
    - Implications
      - Something is wrong with the economic technique, AND/OR
      - Something is wrong with the class
    - Solution
      - Economic technique is theoretically sound
      - Look to find a reason for the outliers and redefine the class to exclude them
        - The outliers may have entered into long-term contracts with their supplier during the preconspiracy period that protected them in the conspiracy period.

Expert testimony in class certification

- *Example 2*: Before and after method applied to price fixing
  - Same as Example 1, except that we know only the prices, not the COGS for the individual transactions or that the conspiracy was a COGS markup
    - Example 1 was dramatically oversimplified
  - Need a different regression technique:

$$price_t = \alpha + \beta Dummy_t + \gamma Common\_factors_t + \varepsilon_t \text{ (for t = 1, ..., 200)}$$

where $Dummy_t = 0$ for t = 1, . . ., 100 (the nonconspiracy period)

$= 1$ for t = 101 . . ., 100 (the conspiracy period)

The *Dummy* variable picks up the *estimated average effect* of the conspiracy on price.

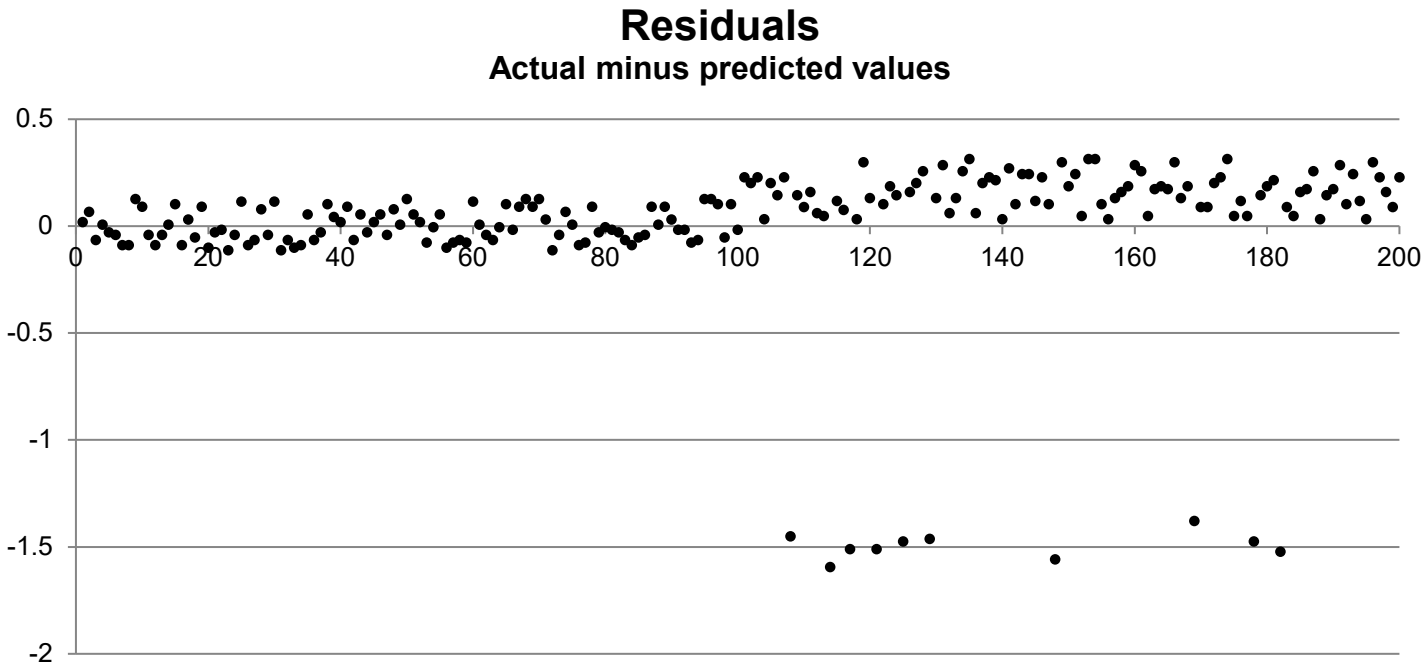
Running the regression (without the common factors):

$$E(price) = 9.95 + 1.50 Dummy + \gamma Common\_factors$$

So that the estimated average nonconspiratorial price is 9.95 and the estimated average conspiracy price is 11.45—again suggesting positive average impact.

Expert testimony in class certification

- *Example 2*: Before and after method applied to price fixing (con't)



- Residuals are just another way at looking a errors
- Outliers again suggest that there is a problem in class definition
- Excluding the outliers from the class definition provides confirmation of common impact
- But even without the outliers, note the dispersion in the residuals. Is this technique "good enough" to provide a class-wide method for quantifying damages?
  - Almost certainly yes

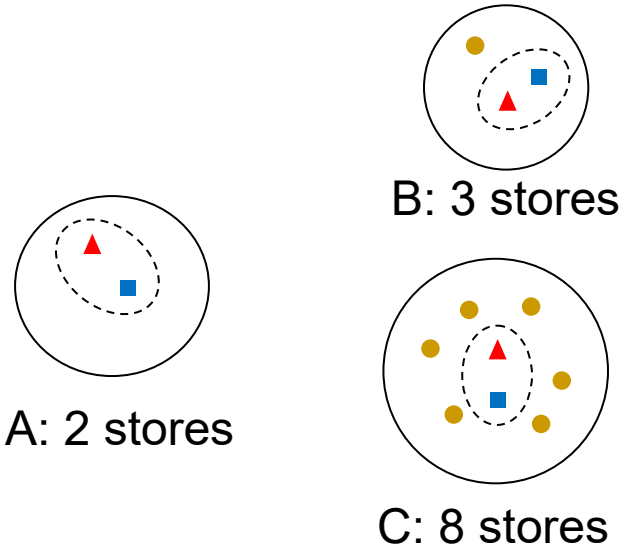
Expert testimony in class certification

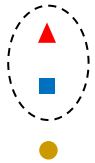
- Yardstick method applied to a merger
  - Run regression analysis of price against the number of stores across all three geographic areas

    $$p_i = \alpha + \beta n_i + O_i$$

    where

    p_i = price in area i
    n_i = number of stores in area I
    O_i = other things in the regression
  - Estimate coefficients and calculate predicted value t_i for the price in each area with one less competitor.
  - Then $t_i - p_i > 0$ shows impact and $t_i - p_i$ is the overcharge in each area





Merging firms

Third-party competitors
(all independent of each other)

Caution: This analysis is *very* simplistic and for illustration purposes only.

Expert testimony in class certification

- Proving impact and damages formulaically—Questions
  1. Is it sufficient for plaintiffs to demonstrate that the average class member suffered harm according to a formula that analyzes a subset of transaction data, calculates an average overcharge from that subset, and then assumes that the average overcharge tainted all other transactions in the market?
     - In *Tyson Foods*, the Supreme Court held that if the statistically analysis would have been admissible and could have sustained a reasonable jury finding as to the question posed (here, the overcharge) as to each putative class member's claim, if brought as an individual action, then the statistical analysis is a permissible means of establishing the answer on a classwide basis in a class action[1]
       - The Thomas dissent agreed with the principle, although it disagreed as to its applicability in the case
       - The dissent also drew a distinction, common in antitrust law, between proof of liability and proof of the amount of damages: proof of liability should be relatively demanding, but once liability is established a lesser standard may apply to proof of the amount of damages so that a liable defendant is not allowed to escape payment of damages

[1] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1047 (2016).

Expert testimony in class certification

- Proving impact and damages formulaically—Questions
  2. Given that the Rules Enabling Act states that Rule 23 cannot alter fundamental burdens of proof and standing requirements, can a court certify a class where most but not all class members suffered harm?[1]
     - The *Tyson Foods* Court ducked answering*—
       - Since the petitioner abandoned the question of whether a class could be certified when it included uninjured members who had no legal right to damages, the Court did not address it[2]
       - That said, the Court did observe that since no distribution plan had been approved for the class, the question of whether a class could be certified when it contained members that could not prove they were injured was not ripe[3]
       - The Court also observed that it was important to ensure that uninjured class members "do not contribute to the size of any damage award and...cannot recover such damages"[4]
       - Most lower courts have held that the presence of a de minimis number of uninjured members will not preclude certification of the class, although the named plaintiff must show it has a means of isolating those uninjured members at trial.[5]

[1] *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").
[2] *Id*. at 1050. [3] *Id*. [4] *Id*. at 1049.
[5] *See In re* Nexium Antitrust Litig., 777 F.3d 9, 24-25 (1st Cir. 2015) (collecting authorities).

* On January 24, 2025, the Supreme Court granted certiorari in Laboratory Corp. of America v. Davis, No. 24-304, to answer the question.

Expert testimony in class certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Background: Expert testimony as evidence
    - General rule
      - A witness may not testify to a matter on which the witness lack personal knowledge.[1]
    - *Exception*:
      - Rule 702 of the Federal Rules of Evidence permits expert opinion testimony at trial where the testimony is—
        - provided by someone who is "qualified" by knowledge, skill, experience, training, or education;
        - able to assist the trier of fact to understand the evidence or to determine a fact in issue (relevance);
        - based upon sufficient facts or data,
        - the product of reliable principles and methods, and
        - reflects a reliable application of the principles and methods to the facts of the case[2]
      - Burden of proof
        - The party offering the expert opinion testimony must prove each of the Rule 702 requirements by a preponderance of the evidence[3] (NB: The burden is to prove reliability, *not* correctness)

[1] Fed. R. Evid. 602.
[2] Amended in 2000 to incorporate the principles of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[3] Fed. R. Evid. 702 (providing admissibility "if the proponent demonstrates to the court that [satisfaction of the requirements] is more likely than not"—as amended in 2023); *see In re* Onglyza (Saxagliptin) & Kombiglyze (Saxagliptin & Metformin) Prod. Liab. Litig., 93 F.4th 339, 345 n.4 (6th Cir. 2024) (describing 2023 amendments to Rule 702).

Expert testimony in class certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Background: Expert testimony as evidence (con't)
    - Many courts group the Rule 702 requirements using three categories:
      1. Qualifications
         - Captures the requirement that the expert is someone who is "qualified" by knowledge, skill, experience, training, or education to testify on the subject matter
      2. Reliability
         - Captures the requirements that the testimony is
           - based upon sufficient facts or data,
           - the product of reliable principles and methods
           - the result of proper application by the witness has applied the principles and methods reliably to the facts of the case
         - The idea here is that "the expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief."[1]
      3. Fit
         - Captures the requirements that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue
    - A motion to exclude expert testimony for failure to satisfy Rule 702 is commonly called a "*Daubert* motion"

[1] *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994); *accord In re* Blood Reagents Antitrust Litig., No. 09-MD-2081, 2017 WL 3096168, at *2 (E.D. Pa. July 19, 2017).

Expert testimony in class certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Expert testimony in class certification proceedings
    - Technically, there is no requirement that courts only consider matters admissible in evidence at trial in class certification
      - Rule 702 does not explicitly apply to class certification proceedings
    - Until recently, courts declined to resolve any conflicts between the plaintiffs' and defendants' respective experts, leaving the "battle of experts" to be decided by the trier of fact
      - Which rarely happened, since very few antitrust class actions are tried on the merits
    - But current case law requires courts in a certification proceeding to resolve expert disputes, even about the merits, if necessary to making a finding whether a Rule 23 requirement has been satisfied in the case
    - This raises the question of what standard expert testimony must satisfy in order to be included as part of the record in the certification proceeding

Expert testimony in class certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Expert testimony in class certification proceedings
    - Courts are increasingly requiring that experts be qualified and their testimony be reliable
      - Keep in mind that the testimony is on the ability of the plaintiff to present a reliable method of classwide proof of an element of the claim, *not* to prove the element
      - In *Wal-Mart*, the Supreme Court indicated in dictum that the district court must conduct some reliability assessment akin to a *Daubert* inquiry[1]
      - Several circuits have now indicated that *Daubert* applies at the certification stage[2]
        - "Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied."[3]
      - Other courts have adopted a more nuanced approach: "[A] focused *Daubert* analysis which scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence."[4]

[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011).
[2] *See, e.g.*, *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012).
[3] *Blood Reagents*, 783 F.3d at 187; *see In re* Hyundai & Kia Fuel Econ. Litig., 881 F.3d 679, 692 (9th Cir. 2018).
[4] *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613, 614 (8th Cir. 2011).

Expert testimony in class certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Expert testimony in class certification proceedings (con't)
    - Courts are increasingly requiring that experts be qualified and their testimony be reliable
      - Technically, what would seem to be required is a finding that the expert testimony proposed by the named plaintiffs as classwide proof will be admissible under Rule 702 when adduced at trial, not that it satisfied Rule 702 at the class certification stage
        - But this still begs of the question of how confident the court is that the expert testimony will in fact be admissible at trial
        - In *Blood Reagents*, the Third Circuit expressly rejected the lower court's reliance on expert testimony at the class certification stage that "could evolve" into admissible evidence at trial[1]

[1] *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 186 (3d Cir. 2015) ("[W]e believe *Behrend's* 'could evolve' formulation of the Rule 23 standard did not survive *Comcast*.").

Expert testimony in class certification

- *Daubert* and Rule 702 of the Federal Rules of Evidence
  - Assessing the sufficiency of plaintiff expert's testimony
    - So what is required? Some possibilities (in ascending order of development)—
      1. The mere identification of the technique to be employed (e.g., "before-and-after" method, using regression analysis) but without results[1]
      2. Some examples of possible model specifications (e.g., some possible regression specifications), but without running the models
      3. Actual runs of the model demonstrating the model's workability, but not resolving whether the expert's model actually provides an acceptable means of common proof on the merits[2]
      4. Completed analysis ready for presentation at trial (although perhaps subject to further refinement)
    - Modern courts are increasingly requiring models to reach at least the third stage of development

[1] *In re* Ready-Mixed Concrete Antitrust Litig., 261 F.R.D. 154 (S.D. Ind. 2009) (finding that plaintiff's expert proposed a reliable method for showing common impact and damages and denying defendants' motions to exclude).
[2] *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82 (D. Conn. 2009) (rejecting defendants' criticism that the plaintiff expert's regression omitted key variables as a premature and unnecessary inquiry into the merits).

Expert testimony in class certification

- Challenges to the named plaintiffs' expert testimony at certification
  - *Type 1 challenge*: The expert testimony is fundamentally flawed and therefore unreliable
    - If the expert testimony is unreliable, it cannot be used to establish that there will be a method of classwide proof at trial
    - This type of challenge requires resolution before the court may rely on the testimony in certifying the class, even if the resolution touches upon the merits of the case[1]
    - *Example*: Model detects impact for class members that undisputedly cannot have suffered antitrust injury[2]
    - *Example*: Model omits critical explanatory variable(s)

[1] *See In re* Evanston Northwestern Healthcare Corp. Antitrust Litig., 268 F.R.D. 56, 86-87 (N.D. Ill. 2010) (finding plaintiff failed to establish a reliable method of classwide proof of impact in light of defendants' expert challenge to plaintiffs' expert analysis).
[2] Rail Freight Fuel Surcharge, 725 F.3d at 254 ("[W]e have no way of knowing the overcharges the damages model calculates for class members is any more accurate than the obviously false estimates it produces for legacy shippers.").

Expert testimony in class certification

- Challenges to the named plaintiffs' expert testimony at certification
  - *Type 2 challenge*: The expert testimony is not fundamentally wrong but should be rejected in light of the defendants' "superior" contravening analysis
    - If the plaintiff's expert makes out a prima face case that the element of claim in question can be shown by classwide proof, the court may rely on this testimony to certify the class and allow the jury to resolve the dispute when challenged methodology is employed to prove the merits at trial.[1]
    - *Example*: Model fails to include all statistically significant explanatory variables, although it includes the most important ones
  - *Query*: What is the dividing line between a Type 1 and a Type 2 challenge?
    - This is a particular problem in challenges to model specification (e.g., omitted variables, wrong variables): When is a model specification so fundamentally wrong that it lacks probative value?

[1] *See, e.g.*, Dial Corp. v. News Corp., 314 F.R.D. 108, 115-17 (S.D.N.Y. 2015); *In re* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 2013 WL 5391159, at *8 (N.D. Cal. Sept. 24, 2013).

Expert testimony in class certification

- Challenges to the named plaintiffs' expert testimony at certification
  - *Example*: Currency Conversion Fee Antitrust Litigation[1]
    - Expert analyses
      - Plaintiff's expert concluded in that in the absence of a conspiracy banks would not have charged a fee—hence, class-wide impact
      - Defendant's expert concluded that the "but for" fee in a world without the conspiracy would be the same as the current fee—hence, no impact
    - Court
      - Since both expects used the same method the court found that impact could be resolved using class-wide proof
        - The common methodology involved comparing actual prices to those that would exist in a "but for" world without the alleged conspiracy, not the particular economic tools to determined the "but for" price
        - Not necessary to resolve which expert was correct, since it is only the method not the result that is in issue
          - The question on class certification is whether the plaintiff's methodology would prove common impact *if* it exists, not that common impact in fact exists
        - Also, court noted that it was irrelevant that different banks may have joined the conspiracy at different times (so that the timing of the overcharge and hence the class members affected might differ over time), since by joining the conspiracy each bank became jointly and severally liable for all of the conspiratorial damages, including the damages inflicted by the conspiracy prior to the bank's participation

[1] *In re* Currency Conversion Fee Antitrust Litig., MDL No. 1409, 2010 WL 305448, at *13 (S.D.N.Y. Jan. 22, 2010).

Expert testimony in class certification

- Daubert in appeals
  - Ninth Circuit:

> Where, as here, a defendant did not raise a Daubert challenge to the expert evidence before the district court,7 the defendant forfeits the ability to argue on appeal that the evidence was inadmissible, but may still argue that the evidence is not capable of answering a common question on a class-wide basis.

[1] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 665 (9th Cir. 2022) (en banc) (citing *Comcast*, 569 U.S. at 32 n.4; and *Tyson Foods*, 577 U.S. at 458-59).

Class notice of class certification

- Only members of a Rule 23(b)(3) class have a right to reasonable notice of class certification and the opportunity to opt out of the class
  - The court has discretion to order reasonable notice and an opt-out opportunity for (b)(1) and (b)(2) classes (so-called mandatory classes)
- Rule 23(b)(3) notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"[1]

[1] Fed. R. Civ. P. 23(c)(2).

Class notice of class certification

- Means of notice
  - May variously include:[2]
    - Individual notice
      - Notice by first-class mail
      - Email notice
      - Mailed notice upon request
    - Publication notice
      - An informative settlement website
      - A telephone support line
      - An online campaign
      - Digital banner advertisements (google, Yahoo, Facebook, Instagram)
      - Sponsored search listings (Google, Yahoo and Bing)

[1] Fed. R. Civ. P. 23(c)(2).

[2] *See, e.g.*, *In re* Lithium Ion Batteries Antitrust Litig., No. 13MD02420YGRDMR, 2020 WL 7264559, at *17 (N.D. Cal. Dec. 10, 2020) (discussing settlement class notice).

Class notice

- Must state:
  - the nature of the action;
  - the definition of the class certified;
  - the class claims, issues, or defenses;
  - that a class member may enter an appearance through an attorney if the member so desires;
  - that the court will exclude from the class any member who requests exclusion;
  - the time and manner for requesting exclusion; and
  - the binding effect of a class judgment on members under Rule 23(c)(3)[1]

[1] Fed. R. Civ. P. 23(c)(2).

Special problem: Constitutional standing

- General requirement
  - Arises from the Article III case or controversy requirement
  - Threshold requirement in any case[1]
  - Has three "irreducible" elements:[2]
    - Injury-in-fact—an invasion of a legally protected interest that is
      - concrete and particularized, and
      - actual or imminent as opposed to conjectural or hypothetical
    - Causation
      - A causal connection between the injury and the challenged conduct, that is, the injury must be fairly traceable to the defendant's action
    - Redressability
      - It must be "likely" rather than "speculative" that a decision by the court in favor of the plaintiff will redress the plaintiff's injury

[1] Warth v. Seldin, 422 U.S. 490, 498 (1975).
[2] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Special problem: Constitutional standing

- General rule
  - To bring a lawsuit in federal court, a plaintiff must have Article III standing[1]
- Application in class actions
  - Named plaintiff
    - Must have constitutional standing as to its own individual claims[2]
    - Cannot rely on the standing of absent class members[3]
  - Absent class members
    - Absent class members must have Article III to recover[4]
    - *TransUnion LLC v. Ramirez*
      - A plaintiff class brought suit under the Fair Credit Reporting Act (FCRA) alleging that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files when the TransUnion matched their names to a name on the Treasury Department's terrorist database
      - *Held*, the 1853 class members for whom TransUnion provided sent credit reports with this alert to third parties had "concrete reputational harm" and thus had Article III standing; the other 6332 class members for whom TransUnion did not provide credit reports suffered no cognizable concrete injury and thus lacked Article III standing to pursue their claims
    - But *TransUnion* reserved the question of "whether every class member must demonstrate standing before a court certifies a class."[5]

[1] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
[2] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 n. 20 (1976).
[3] *Id*.
[4] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).
[5] *Id*. at 2208 n. 4.

Special problem: Constitutional standing

- Class actions under multiple state antitrust laws
  - *Query*: Can a named plaintiff assert claims of absent class members under state statutes in jurisdictions where named plaintiff could not personally assert a claim?
    - *Example*: In an indirect purchaser class action in federal court, can a named plaintiff asserting a personal claim under Florida law assert a claim for absent class members under California law when the named plaintiff made no purchases subject to California law?
    - The emerging view
      - For each claim under a state's antitrust law, there must be at least one named plaintiff with Article III standing to assert that claim in the named plaintiff's individual capacity[1]

[1] See the cases cited in the slides on typicality.

Certification order

- Timing
  - Court must determine "at an early practicable time" after the class action is filed
    - Prior to 2003, courts were required to decide class certification "as soon as practicable after commencement of an action"
  - The certification proceeding may be commenced by motion or sua sponte
- Contents
  - Must define the class and class claims, issues, or defenses[1]
  - Must appoint class counsel under FRCP 23(g)[2]

[1] Fed. R. Civ. P. 23(c)(1)(B).
[2] *Id*.

Certification order

- "Amending" the class definition prior to class certification
  - Mechanics
    - Courts usually allow named plaintiffs to narrow the definition of the class in—
      - Amended complaints
      - The motion for class certification
    - Changes to expand the definition of the class can be treated more skeptically[1]
- Amending the class definition after class certification
  - May be amended at any time before final judgment[2]
    - Application timely whenever the factual developments within the litigation change in a way that the original certification unsound
    - Certified class may be decertified
    - Class definition may be changed

[1] *See, e.g.*, *In re* Capacitors Antitrust Litig., No. 17-MD-02801-JD, 2020 WL 6462393, at *4 (N.D. Cal. Nov. 3, 2020) (denying class certification).
[2] Fed. R. Civ. P. 23(c)(1)(C); *see* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978) ("[A] district court's order denying or granting class status is inherently tentative.").

Certification order

- Particular issues or subclasses
  - Court may limit action to particular issues[1]
  - Court may create subclasses with their own named representatives and own class counsel[2]
    - Employed to avoid typicality and adequacy of representation problems

      Subclasses must be created when differences in the positions of class members require separate representatives and separate counsel.[3]
    - Each subclass must individually satisfy the Rule 23(a) and 23(b) requirements
    - Subclasses can be created after an initial grant of class certification if intraclass conflicts arise
- Class counsel
  - Certification order must appoint class counsel under FRCP 23(g)[3]
  - Interim class counsel, if one has been appointed, almost always are appointed class counsel

[1] Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").
[2] *Id*. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.").
[3] Manual for Complex Litigation (Fourth) § 21.23 (2004).
[4] Fed. R. Civ. P. 23(c)(1).

Class counsel

- Court must appoint class counsel[1]
  - "Class counsel must fairly and adequately represent the interests of the class."[2]
- Mandatory factors court must consider:[3]
  - The work counsel has done in identifying or investigating potential claims in the action;
  - Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
  - Counsel's knowledge of the applicable law; *and*
  - The resources that counsel will commit to representing the class
  - NB: Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class
- Multiple applicants
  - Court must appoint the qualifying applicant "best able to represent the interests of the class"[4]

[1] Fed. R. Civ. P. 23(g)(1). [2] *Id*. 23(g)(4). [3] *Id*. 23(g)(1)(C). [4] *Id*. 23(g)(2).

Class counsel

- Fiduciary duties
  - Class counsel owes a fiduciary duty to the class as a whole
  - *Query*: Class counsel also represents the named plaintiff in its individual capacity. Does class counsel owe a heightened fiduciary duty to the named plaintiff?
    - For example, does class counsel have an obligation to obey an instruction from the named plaintiff to reject a settlement that class counsel believes is in the best interest of the class as a whole?
  - *Rule*: Class counsel owes a duty to the class as a whole and not to any individual member of the class (including the named plaintiff)[1]
    - *Corollary*: Class counsel does not owe a particular duty to any group comprised of class members, such as class representatives, distinct from the duty owed to the class
    - "To hold otherwise would threaten one of the defining purposes of class actions—the consolidation of claims into one suit where a class of plaintiffs may speak with one voice."

[1] For an extended treatment, see Medical & Chiropractic Clinic, Inc. v. Oppenheim, 981 F.3d 983, 991 (11th Cir. 2020).
[2] *Id*. at 991.

Appeal

- Interlocutory appeals[1]
  - "Inherently interlocutory"
    - Orders granting or denying class certification are "inherently interlocutory" and hence not immediately reviewable under 28 U.S.C. § 1291[1]
  - Permitted by 1997 FRCP amendments
    - Before 1997, interlocutory appeals could only be brought when the district court certified the appeal under 28 U.S.C. § 1292(b) (very rare)
    - Most cases settled, so that there was little incentive or ability to bring an appeal as a matter of right after final judgment
  - May appeal either grant or denial of class certification
  - Petition must be filed within 14 days of court order
  - Certification is in the discretion of both the district court *and* the court of appeals
    - District court must certify the petition
    - Court of appeals must accept petition
  - Appeal does not automatically stay lower court proceedings

[1] Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978); *accord* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1706 (2017).
[2] Fed. R. Civ. P. 23(f).

Appeal

- Interlocutory appeals (con't)
  - Today, interlocutory appeals are rarely accepted
  - Three situations have emerged where appeals may be accepted:[1]
    1. *Death knell*: When the decision to certify is "questionable" and sounds the "death-knell" for the case on the merits, where the pressures for the defendant to settle are compelling independently of the merits of the plaintiffs' claims
    2. *Fundamental unsettled issue*: When the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review
    3. *"Manifest error"*: When the certification decision is "manifestly erroneous"
  - Voluntary dismissal with reservation of right to revive
    - Some plaintiffs, when denied the opportunity for an interlocutory appeal of the denial of class certification, have stipulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims should the court of appeals reverse the district court's certification denial.
    - Such a dismissal does not qualify as a "final decision" within the meaning of Section 1291 and therefore cannot be appealed under that section[2]

[1] *See In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 250 (D.C. Cir. 2013).
[2] Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1707 (2017).

Appeal

- Final appeals
  - Decision on certification may also be appealed as a matter of right after a final judgment
    - But these are very rare, since few antitrust class actions are tried to a final judgment on the merits[1]
  - Trend is to permit unnamed objectors may appeal as a matter of right without formally intervening[2]

[1] For an exception, see *In re* Urethane Antitrust Litig. (Dow Chem. Co. v. Seegott Holdings, Inc.), 768 F.3d 1245 (10th Cir. 2014).
[2] Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (Rule 23(b)(1); Fidel v. Farley, 534 F.3d 508, 512-13 (6th Cir. 2008) (Rule 23(b)(3)); Churchill Village, L.L.C., 361 F.3d 566, 572 (9th Cir. 2004) (same).

Appeal

- Standard of review
  - Abuse of discretion
    - When, as in class certification, decision turns on a variety of case-specific facts, *abuse of discretion* in light of the requirements of Rule 23 is the proper standard of review[1]
      - District court is vested with discretion to make a decision of its choosing with certain bounds
      - District court's factual findings entitled to deference
      - Not subject to reversal within those bounds even if a reviewing court would have made a different decision or if the district court equally within its discretion could have found the other way
    - An abuse of discretion occurs when the trial court—
      - Adopts an incorrect legal rule
        - Review of proper legal rules is de novo and without deference
      - Relies upon a factor not legally cognizable under a proper legal rule
      - Omits consideration of a factor entitled to substantial weight under the rule
      - Makes a clear error in weighing the factors, *or*
      - Rests its conclusions on clearly erroneous factual determinations

[1] *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 703 (1979); Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 663 (9th Cir. 2022) (en banc); Barrows v. Becerra, 24 F.4th 116, 130 (2d Cir. 2022).

Settlements and dismissals

- Settlement classes
  - Settlements in class actions often occur before a class has been certified
    - A class that is first certified after a proposed class settlement is called a "settlement class"
  - A settlement class has to satisfy the Rule 23 requirements
    - But since there will be no trial, manageability concerns are not present
  - Incentives
    - Plaintiff
      - Make the class as large as possible to maximize the class recovery (the "settlement fund") (which, as we shall see later, is likely to maximize class counsel's attorneys' fees)
    - Defendant
      - While the defendant wants to minimize the size of the class when it faces a possible loss at trial, it wants to maximize the size of the class for claim preclusion purposes once a settlement amount is reached
    - Obviously, there is some room for bargaining
      - The parties may agree to increase the size of the proposed class and the settlement fund, but decrease the amount each class member will receive

Settlements and dismissals

- Settlement classes
  - Relation to direct action plaintiffs
    - In an increasing number of cases, individual private actions will be filed by putative class members alongside a class action
    - If the class action settles, the settlement will bar a pending individual action unless the private plaintiff had opted out of the class in the prior litigation[1]
      - Rule 6(b)(1) of the Federal Rules of Civil Procedure provides:

> When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.[2]

[1] *See In re* Processed Egg Prods. Antitrust Litig., 130 F. Supp. 3d 945, 949-50 (E.D. Pa. 2015) (but granting motion to extend time for individual private plaintiff to opt out of the class were its failure was the result of excusable neglect).
[2] Fed. R. Civ. P. 6(b)(1).

Settlements and dismissals

- Settlement amounts
  - WDC: My impression—based on casual impressions and not an formal analysis—is that antitrust class actions often settle at 10% to 20% of claimed single damages (or 3.3% to 6.6% of trebled damages)
    - A survey of 71 settled cartel cases found—
      - An unweighted average settlement of 37% of claimed single damages
      - A sales-weighted average settlement of 19% of claimed single damages[1]
  - Courts appear comfortable with these settlement percentages
    - Look at Judge Rogers said in approving class counsels' fees in *Lithium Battery*:

> Here, in light of the circumstances of the case, the *results achieved for the class are excellent*. Based upon IPPs' estimates, the common fund of the settlement equates to *11.7 percent of the single damages* a nationwide class would have sustained during the eleven-and-a-half-year class period. Further, the litigation entailed a great deal of risk and cost shouldered by counsel on a contingency basis for seven years.[1]

[1] John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015).
[2] *In re* Lithium Ion Batteries Antitrust Litig., No. 13-MD-02420 YGR (DMR), 2020 WL 7264559, at *20 (N.D. Cal. Dec. 10, 2020) (emphasis added).

Settlements and dismissals

- Notice
  - Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal"[1]
  - Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and participate in the proceedings[2]
    - Must be presented in a neutral manner
    - Must describe the settlement fund and the plan of allocation
    - Need not detail the nature of objections
    - Need not analyze the expected value of the litigation is pressed to the merits

[1] Fed. R. Civ. P. 23(e)(1).
[2] Rodriguez v. West Publishing Corp., 563 F.3d 948, 962 (9th Cir. 2009).

Settlements and dismissals

- Rule 23(b)(3) opt-out right
  - In an action previously certified under Rule 23(b)(3), the court "may" refuse to approve a settlement unless it affords a new opt-out opportunity for remaining class members[1]
    - Settling parties almost always provide for this right
- Court approval
  - "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is *fair, reasonable, and adequate*."[2]
    - Not reasonable if a product of collusion
    - The parties seeking approval must file a statement identifying any agreement made in connection with the proposal[3]
  - Decision to grant or deny certification of a settlement class lies within the discretion of the trial court
    - Discretion should be exercised in light of the general policy favoring settlement

[1] Fed. R. Civ. P. 23(e)(4).
[2] *Id*. 23(e)(2).
[3] *Id*. 23(e)(3).

Settlements and dismissals

- Court approval
  - Factors to consider
    - Procedural fairness
      - Conduct of the negotiations that led to the settlement
    - Substantive fairness
      - Complexity, expense and likely duration of the litigation
      - Reaction of the class to the settlement
      - Stage of the proceedings and the amount of discovery completed
      - Risks of establishing liability
      - Risks of establishing damages
      - Risks of maintaining the class action through the trial
      - Ability of the defendants to withstand a greater judgment
      - Range of reasonableness of the settlement fund in light of the best possible recovery
      - Range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[1]

[1] *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003), *aff'd*, 396 F.3d 96 (2d Cir. 2005). The litany varies in articulation from circuit to circuit.

Settlements and dismissals

- Court approval (con't)
  - Factors to consider
    - Availability of treble damages
      - Courts do not traditionally factor treble damages into the calculus for determining a reasonable settlement value1
      - Courts generally assess fairness on how it compensates class members for putative actual injuries
      - In exceptionally strong cases, however, it may be appropriate for a district court to consider treble damages

[1] Rodriguez v. West Publishing Corp., 563 F.3d 948, 964 (9th Cir. 2009); *but see In re* Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 210 n. 30 (D. Me. 2003) (questioning rationale).

Settlements and dismissals

- Emerging conflicts
  - If a conflict of interest emerges in the settlement proceedings with some but not all named plaintiffs, the court may rely on the nonconflicted named plaintiffs and approve an otherwise acceptable settlement[1]
- Objections[2]
  - Any class member may object to the proposal if it requires court approval
  - The objection may be withdrawn only with the court's approval
    - This is to prevent the class counsel or the defendant from "buying off" the objecting class member
- Interpretation
  - Settlement agreements are contracts and must be construed according to general principles of contract law
    - When interpreting unambiguous contracts, the terms must be afforded their plain meaning
  - The interpretation of a contract is a legal matter for the court

[1] *Rodriguez*, 563 F.3d at 961.
[2] Fed. R. Civ. P. 23(e)(5).

Settlements and dismissals

- Appeal
  - Objectors may appeal the final approval of the settlement as a matter of right
    - In large class actions, multiple absent class members may raise objections and there may be multiple appeals from the order finally approving the settlement[1]
    - In some cases, the same objector may file more than one appeal in the same case
      - Typically, one against the final settlement approval and one against the award of attorneys' fees
  - Settlement approval reviewed for abuse of discretion
    - To be reviewed as a whole, not individually by component parts

[1] *See, e.g.*, Blessing v. Sirius XM Radio Inc., No. 1:09-cv-10035 (S.D.N.Y. Dec. 7, 2009) (12 separate appeals filed in the Second Circuit by different objectors); *In re* Online DVD Rental Antitrust Litig., No. 4:09-md-02029 (N.D. Cal. Apr. 13, 2009) (6 appeals filed in the Ninth Circuit by different objectors); *In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, No. 3:07-md-1827 (N.D. Cal. Apr. 20, 2007) (5 objector appeals were filed from the July 11, 2012, partial settlement and 8 appeals were filed from the March 29, 2013, partial settlement).

Settlements and dismissals

- Releases
  - Definition
    - A contract that estops the contracting plaintiff from bringing a “released” claim against the contracting defendant
  - Claims outside the settling action
    - Releases may cover claims not presented in the complaint, so long as the released conduct arises out of the same factual predicate as the settled conduct
      - This prevents class members from subsequently asserting claims relying on a different legal theory but predicated on the same facts
      - Query: What constitutes the same predicate facts?
  - Claims in the settling action
    - A release is not necessary for the claims in the case being settled, since, if the court enters the settlement as a final judgment, class members will be barred by res judicata (claim preclusion) in any future action against the settling defendant
      - Note: In non-class action cases, settlements may be achieved purely contractually, with the case being dismissed and no final judgment entered. In these situations, the defendant will need a release for the claims in the settling action as well as outside claims.

Settlements and dismissals

- Releases
  - *Example*: Visa Check/Mastermoney[1]

    [T]he Released Parties shall be released and forever discharged from all manner of claims ... against the Released Parties ... that any Releasing Party ever had, now has or hereafter can, shall or may have, relating in any way to any conduct prior to January 1, 2004 concerning any claims alleged in the Complaint or any of the complaints consolidated therein, *including, without limitation, claims which have been asserted or could have been asserted in this litigation which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, or other law or regulation, or common law, including, without limitation, the Sherman Act,15 U.S.C. § 1 et seq.* (emphasis added)

    - Visa Check/Mastermoney primarily involved a tying claims—merchants who wanted to accept a network's credit card must also accept its debit card—and included a grabbag of other legal theories, including price fixing.
    - Release operated against a putative class action brought by merchants in California alleging price fixing in the setting of interchange rates[2]
      - Both cases involved allegations of supracompetitive pricing in the rates charged to merchants in connection with the acceptance of a network's cards

[1] *In re* Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd*, 396 F.3d 96 (2d Cir. 2005).
[2] *Id*. at 513 (as against Reyn's Pasta Bella, LLC v. Visa U.S.A., 259 F. Supp. 2d 992, 997 (N.D. Cal. 2003), *aff'd*, 442 F.3d 741 (9th Cir. 2006)).

Compensating class counsel

- Class counsel are almost never compensated on an hourly basis by the named plaintiffs for their services
  - The named plaintiff can recover no more in a class action than it could in an individual action, and since pursuing class certification will significantly increase the costs of the litigation, there is no reason for the named plaintiff to be willing to shoulder the expenses of the litigation
  - Moreover, in the usual class action, the "small claims" nature of the litigation makes it economically irrational for the named plaintiff to bring suit even in its individual capacity
- Statutory fee-shifting typically not available
  - Class actions typically settle, and "reasonable attorneys' fees" under the Clayton Act are provided only for plaintiffs that "substantially prevail" on the merits
  - Consequently, a non-statutory means for compensating class counsel is necessary

Compensating class counsel

- The common law "common fund" doctrine
  - A plaintiff that creates a "common fund" that benefits a larger set of persons is entitled to offset its counsel fees and litigation expenses against the fund

> The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.[1]

    - Over time, this right to recover from the common fund has been extended to the plaintiff's attorney as well as the litigant itself
  - Essentially the exclusive method of compensating class counsel
    - Where a class action creates a common fund, court will award reasonable attorneys' fees from the fund
    - Moreover, recognizing the public policy behind class actions, courts will take into account the need to compensate class counsel in successful actions for the risk it assumed in prosecuting the action and advancing the litigation costs

[1] Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

Compensating class counsel

- Two major methods of determining common fund attorneys' fees
  1. *Percentage of recovery*: A fixed, reasonable percentage of the common fund
     - Clear trend in class actions in federal court for federal claims is to use this method
     - Factors to consider (nonexhaustive)[1]
       1. The extent to which class counsel achieved exceptional results for the class
       2. Whether the case was risky for class counsel
       3. Whether counsel's performance generated benefits beyond the cash settlement fund
       4. The market rate for the particular field of law for the attorneys involved
       5. The burdens class counsel experienced while litigating the case
       6. Whether the case was handled on a contingency basis

[1] *See, e.g.*, Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1048-50 (9th Cir. 2002).

Compensating class counsel

- Two major methods of determining common fund attorneys' fees
  1. *Percentage of recovery*: A fixed, reasonable percentage of the common fund
     - No set percentages to be used in the percentage of recovery calculations
       - Most fee awards found in the 20 to 30 percent range
       - Factors indicating a higher percentage:
         - Vigorously litigated for a protracted period of time
         - Involved novel and complex issues
         - Presented a substantial risk of absolute non-payment
         - Prosecuted by class counsel of considerable reputation and past success who require higher percentage fee awards to be attracted to the case
       - Also, the larger the recovery of the class, the lower the percentage of the common fund to be awarded as attorneys' fees in light of the economies of scale in litigating the case
         - In cases where the common fund is between $100 and $200 million, fees usually range from 4 percent to 10 percent, with lodestar multipliers commonly between 1.35 and 2.99[1]
         - Courts justify a lower percentage of recovery in "megacases" with the observation to the effect that "in many instances the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel."[2]

[1] *See In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 742 (3d Cir. 2001) (surveying cases).
[2] *In re* Optical Disk Drive Prod. Antitrust Litig., 959 F.3d 922, 933 (9th Cir. 2020); *see, e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 122 (2d Cir. 2005); *In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 339 (3d Cir. 1998).

Compensating class counsel

- Two major methods of determining common fund attorneys' fees
  2. *Lodestar method*: Hours reasonably expended by counsel multiplied by a hourly rate reasonable in the circumstances
     - This is the method used in awarding statutory attorneys' fees
     - Except that in common fund cases a multiplier may be used to compensate counsel for the risk in taking on the action

Compensating class counsel

- A third method: "Market rate"
  - The Seventh Circuit has adopted the "market rate" as the starting point for determining fee awards in class actions[1]
  - Although the market rate is "inherently conjectural,"[2] determination of the market rate can be informed by—
    - the actual agreements between the parties as well as fee agreements reached by sophisticated entities in the market for legal services;
    - the risk of non-payment at the outset of the case;
    - the caliber of Class Counsel's performance; and
    - information from other cases, including fees awarded in comparable cases[3]
  - "The fact that fee awards in antitrust cases in this circuit [Seventh] are almost always one-third is a strong indication that this should be considered the "market rate."[4]

[1] *In re* Synthroid Mktg. Litig., 264 F.3d 712, 719 (7th Cir. 2001); *accord* Silverman v. Motorola Sols., Inc., 739 F.3d 956, 957 (7th Cir. 2013) ("[A]ttorneys' fees in class actions should approximate the market rate that prevails between willing buyers and willing sellers of legal services."); Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 635 (7th Cir. 2011) ("[T]he district court must try to assign fees that mimic a hypothetical ex ante bargain between the class and its attorneys.").
[2] *In re* Trans Union Corp. Priv. Litig., 629 F.3d 741, 744 (7th Cir. 2011).
[3] Hale v. State Farm Mut. Auto. Ins. Co., 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) (citing *Synthroid*, 264 F.3d at 719); *accord In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 6124787 (N.D. Ill. Oct. 7, 2022).
4 *Broiler Chicken*, 2022 WL 6124787, at *4.

Compensating class counsel

- Standard governing court awards
  - *General rule 1*: Whatever the method, the fee award cannot exceed what is *reasonable* under the circumstances
    - What is reasonable is within the discretion of the trial court and will not be overturned on appeal in the absence of an abuse of discretion
  - *General rule 2*: Reasonableness requires that attorneys' fees should be awarded only for the common fund that the attorney created
    - Where class counsel was able to take advantage of extensive government investigation work, the fee should be based on only the additional value class counsel created[1]
  - Common methodology
    - Use percentage of recovery as primary method
    - Use lodestar method as a check for reasonableness

[1] *In re* First Databank Antitrust Litig., 209 F. Supp. 2d 96 (D.D.C. 2002) (crediting FTC's objection to fee petition).

Compensating class counsel

- Role of court
  - Acts as a fiduciary for the class
    - Because the relationship between class counsel and class members turns adversarial at the fee-award stage, district courts assume a fiduciary role that requires close scrutiny of class counsel's requests for fees and expenses from the common fund
  - Requires findings
    - District courts must ensure their fee awards are—
      1. Reasonable, and
      2. Supported by findings that take into account all of the circumstances of the case

Compensating class counsel

- When appointing class counsel
  - "Competitive bidding"
    - In some cases, the court has asked competing candidates for class counsel appointment to propose a fee arrangement they would accept, effectively setting up an "auction" on the fee award[1]
      - When appointing class counsel, while the court may take into account the fee proposals, it must select a law firm that will "fairly and adequately represent the interests of the class" considering all relevant factors
      - Fee auctions are relatively rare, probably because courts engage in a detail review of the attorneys' fee petition—which is often contested by objectors—before awarding attorneys' fees to class counsel
    - Court may include in the appointing order provisions about the award of attorney's fees[2]
  - Ninth Circuit rule:

> [W]hen class counsel secures appointment as interim lead counsel by proposing a fee structure in a competitive bidding process, that bid becomes the starting point for determining a reasonable fee. The district court may adjust fees upward or downward depending on circumstances not contemplated at the time of the bid, but the court must provide an adequate explanation for any variance.[3]

[1] Fed. R. Civ. P. 23(g)(1)(C); *see In re* Optical Disk Drive Prod. Antitrust Litig., 959 F.3d 922 (9th Cir. 2020).
[2] *Id*. 23(g)(1)(D). [3] *Optical Disk Drive*, 959 F.3d at 934-35.

Compensating class counsel

- Final award must be approved by court
  - Procedure[1]
    - Claim for award of attorney's fees must be made by motion
    - Notice of motion must be served on all parties
      - Any motion by class counsel must also be "directed to class members in a reasonable manner"
    - Class members may object
    - Court may hold a hearing
    - Court must find facts and state its legal conclusions under FRCP 52(a)
    - Court must ensure that attorneys' fees awarded are reasonable
      - This duty exists independent of any objection from a member of the class
  - Appeal
    - Order awarding attorney's fees is appealable by those who bear the cost of payment (usually class members)
      - Unsuccessful objectors to a fee award may appeal as a matter of right without intervening as a part in the action
      - Objections to fee awards and appeals are common
    - Standard of review: Abuse of discretion

[1] Fed. R. Civ. P. 23(h).

Compensating class counsel

- Example: *NYC Bus Tour*[1]

NYC Bus Tour Attorney Fees, Expenses, and Class Distribution

Common fund	$19,000,000	
Attorney fee lodestar	$1,873,699	9.9%
Attorney fee award (1/3)	$6,333,333	33.3% ← Percentage of recovery
Multiplier (3.4)		
Litigation costs award	$863,629	4.5%
Notice/admin class cost award	$1,069,158	5.6%
Total awards	$8,266,120	43.5%
Total claims	$4,846,660	25.5%
242333 tickets @$20 per ticket		
Residual in common fund	$5,887,220	31.0%
To be distributed to the ATD and NYS AG		

Lodestar and multiplier →

[1] Order of Distribution, *In re* NYC Bus Tour Antitrust Litig., No. 1:13-cv-00711-ALC-GWG (S.D.N.Y. Sept. 21, 2015).

Compensating class counsel

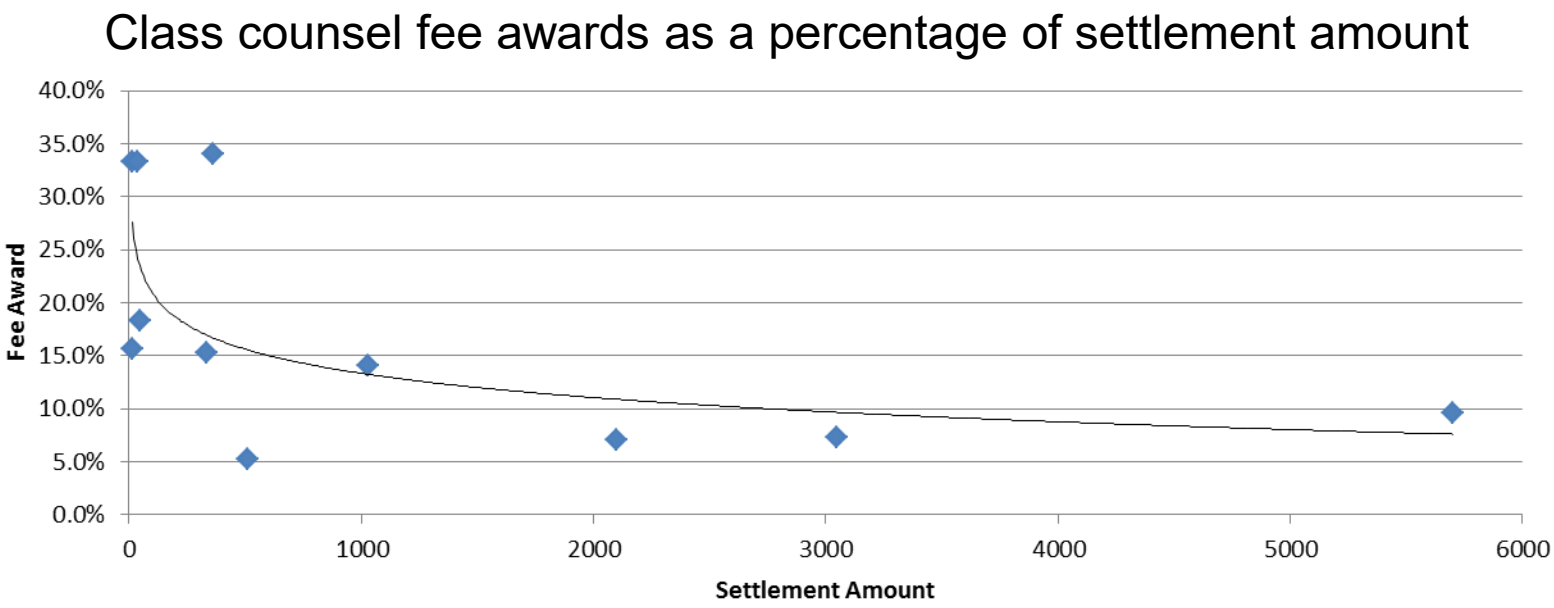
Case	Settlement	Percentage of Recovery	Lodestar Multiplier
In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 991 F. Supp.2d 437(E.D.N.Y. 2014)	$5.7 billion	9.56% ($544.8 million)	3.4
In re Fasteners Antitrust Litig., No. 08–md–1912, 2014 WL 296954 (E.D. Pa. Jan. 27, 2014)	$15.55 million	33.33% ($5.85 million)	0.68[1]
In re Flonase Antitrust Litig., 291 F.R.D. 93 (E.D. Pa. 2013)	$35 million	33.33% ($11.655)	.67
In re Currency Conversion Fee Antitrust Litig., MDL No. 1409, 2012 WL 3878825 (S.D.N.Y. Aug. 22, 2012)	$49.5 million	18.25% ($9.034 million)	1.35
Park v. Thomson Corp., No. 05 Civ. 2931(WHP), 2008 WL 4684232 (S.D.N.Y. Oct. 22, 2008)	$13 million	15.6% ($2.0 million)	1.5
In re Currency Conversion Fee Antitrust Litig., 263 F.R.D. 110 (S.D.N.Y. 2009)	$336 million	15.25% ($51.25 million)	1.6

[1] Counsel reported it had lodestar of $8,540,668.80 in fees.

Compensating class counsel

Case	Settlement	Percentage of Recovery	Lodestar Multiplier
In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd*, 396 F.3d 96 (2d Cir. 2005)	$3.05 billion fund + reduction by 1/3 of debit card interchange fees (valued at $846 million)	6.5% ($220.2 million)	3.5
In re Monosodium Glutamate Antitrust Litig., 2003 WL 297276 (D. Minn. Feb. 6, 2003)		30% ($24,420,000)	Slightly less than 2
In re Vitamins Antitrust Litig. No. 99-197, MDL No. 1285, 2001 WL 856290 (D.D.C. July 16, 2001)	$359.4 million	34% ($123.2 million)	
In re Auction Houses Antitrust Litig., 2001 WL 170792 (S.D.N.Y. Feb. 22, 2001)	$512 million	5.2% ($27 million)	Not available
Shaw v. Toshiba America Information Systems, Inc., 91 F. Supp. 2d 942 (E.D. Tex. 2000)	$2.1 billion	7.0% ($147 million)	Not available
In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)	$1.027 billion (all cash)	14% ($143.8 million)	

Compensating class counsel



Data from prior slides (not a random sample)

- But the rule is circuit-dependent
  - The Seventh Circuit, for example, has rejected diminished percentage fee awards for "megafunds" in favor of a "market price" rule

[1] *In re* Synthroid Mktg. Litig., 264 F.3d 712, 718 (7th Cir. 2001) (reversing district court's fee award in part because it imposed a lower fee percentage for a settlement fund more than $100 million and holding "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time").

Compensating class counsel

- Interim fee awards
  - In some cases where some but not defendants have settled, the court may make an interim fee award upon approval of the partial settlement
    - Some courts find that interim fee awards are in the public interest to encourage representation in large and complex class actions[1]

[1] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 6124787, at *2 (N.D. Ill. Oct. 7, 2022).

Compensating class counsel

- Interim fee awards
  - Example
    - Broiler Chickens[1]
      - Six out of more than 20 defendants settled for $181 million with the End-User Plaintiff Class
      - The court awarded interim counsel—
        - $57.4 million (33%)
          - *Lodestar*: 7,522.2 hours representing $32,853,802.00 in fees
          - Presumably on the entire litigation to the time of settlement, not just the settlement
        - $8.75 million in expenses
          - Incurred more than $9 million in expenses
          - But applying the 33% percentage *after* deducting expenses (Seventh Circuit rule)
      - Court observations
        - No government investigation preceded the complaint
        - Few counsel expressed interest in pursuing the case
        - "[O]pposed by many defendants, including a number of very large and well-funded corporations, which have retained some of the most prominent and sophisticated law firms in the United States"
        - Court's decision to deny the motion to dismiss was a "relatively close call"
        - Counsel successful defended against a "significant" motion to dismiss and obtain class certification
        - Conducted extensive discovery

[1] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 6124787 (N.D. Ill. Oct. 7, 2022).

Compensating class counsel

- Interim fee awards
  - Example
    - Broiler Chickens (con't)

> Appointed Counsel have devoted thousands of hours to this case. Their performance to date has been exemplary. The road to some of the settlements was eventually smoothed by later criminal indictments and corporate plea agreements. But Appointed Counsel's work appears to have prompted the government investigations that led to those indictments, rather than the reverse. A substantial award is warranted here as a proper incentive for high quality counsel to take on complex cases, requiring a massive investment of time and money, with such a high risk of non-payment.[1]

[1] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2022 WL 6124787, at *4 (N.D. Ill. Oct. 7, 2022).

Compensating class counsel

- Objectors
  - *Application*: The common fund created by objectors from which attorneys' fees would be awarded would be the *additional* recovery that resulted from the objector's efforts[1]
    - This includes both increases to the absolute size of the settlement fund and decreases in the award of attorneys' fees to class counsel
- Appeal
  - An attorneys' fee award in a class action is reviewed for abuse of discretion

[1] *See In re* Lithium Ion Batteries Antitrust Litig., No. 21-15120, 2022 WL 16959377, at *2 (9th Cir. Nov. 16, 2022); Rodriguez v. Disner, 688 F.3d 645, 658-59 (9th Cir. 2012) (objectors "may claim entitlement to" attorneys' fees when they confer a substantial benefit on the class); Rodriguez v. West Publ'g Corp., 563 F.3d 948, 963 (9th Cir. 2009) (finding it "clearly erroneous" to deny fees to objectors who augmented the class's net fund); *In re* Southwest Airlines Voucher Litig., 898 F.3d 740, 746 (7th Cir. 2018) (reversing denial of fees to objector who conferred benefit on the class).