A Questionable New Standard for Class Certification in Antitrust Cases

BY JOSHUA P. DAVIS AND ERIC L. CRAMER

IN RECENT YEARS, A NEW STANDARD appears to have emerged regarding class certification. Courts have largely dismissed the notion—originally derived from *Eisen v. Carlisle & Jacquelin*[1]—that they cannot resolve issues relevant to the merits in deciding whether to certify a class. How far they may delve into the merits, however, has remained somewhat of a mystery.

From this perspective, the Supreme Court's recent decision in *Wal-Mart v. Dukes* was anticlimactic.[2] It did little to assist lower courts and parties as they try to sort out the new rules that appear to be emerging for class certification. This void is particularly apparent in antitrust cases. Indeed, in *Behrend v. Comcast Corp.*, an antitrust case decided right after *Dukes*, the Third Circuit concluded that because of the different "factual and legal underpinnings," *Dukes* "neither guide[d] nor govern[ed]" the decision whether to certify a class in that case.[3]

At the same time, *Comcast* expressed grave doubts about the consequences of a heightened merits-based inquiry at class certification.[4] This concern is understandable in our view. Various problems beset this emerging approach, at least as applied in antitrust cases. First, it is vague. Courts have not clarified such fundamental issues as the showing plaintiffs must make for a court to certify a class, the degree to which a court may delve into the merits at class certification, and the percentage of a class that plaintiffs must be able to show suffered injury for a court to certify a class. Moreover, to the extent courts have addressed these issues, they have failed to explain how the requirements they have imposed serve the principal purpose of the predominance requirement: to ensure that individual issues will not overwhelm common ones at trial.[5]

The second problem is that the new standard meshes poorly with the existing litigation process. Courts now appear to require a more searching inquiry into the merits than is sensible based on the relatively early stage at which the certification decision is supposed to take place. As a result, it may make sense to delay the class certification decision until summary judgment or even until after trial. Indeed, if merits issues are to be addressed, the Seventh Amendment may *require* courts to await a jury's findings on the merits before deciding class certification.

Third, any change in the certification standard may well be unnecessary. A key motivating factor behind the new approach appears to be the belief that granting class certification puts undue pressure on defendants to settle meritless cases.[6] That this problem occurs with any frequency is unsubstantiated as a matter of fact and implausible as a matter of theory. Given the weaknesses of this justification for changing class action standards, there is a real risk that the catalyst for recent legal developments in this area is ideology rather than evidence, sound policy concerns, or doctrinal requirements.

Whatever the merits of the potential new class certification standard, the practical problems it creates are numerous. But some solutions, however imperfect, are possible. These range from ending the past practice in some courts of bifurcating discovery on class certification and the merits, to combining the adjudication of class certification and summary judgment, to delaying the certification decision until plaintiffs have had adequate discovery. If the burden on plaintiffs at the class certification stage has increased, as has the cost to everyone of adjudicating certification, measures should be taken to ensure that plaintiffs have a sufficient opportunity to develop their case while, at the same time, streamlining litigation for the parties and the courts to the extent possible given the new requirements.

Vague Standard

Obscurity Regarding the Merits. At first blush, the recent trend in class certification decisions appears clear. Courts have said that plaintiffs must show that they can satisfy the elements of Federal Rule of Civil Procedure 23. The preponderance of evidence standard provides the ordinary burden of persuasion. It is unsurprising, then, that courts have applied that standard to class certification. They have held that plaintiffs must show by a preponderance of evidence that they satisfy the relevant requirements of Rule 23.[7] This sim-

Joshua P. Davis is Associate Dean for Faculty Scholarship and Professor, University of San Francisco School of Law. Eric L. Cramer is a Managing Shareholder at Berger & Montague, P.C. in Philadelphia. Mr. Cramer's firm acted as class counsel in the following cases discussed or cited below: In re *Linerboard Antitrust Litig., 305 F.3d 145 (3d Cir. 2002);* In re *Cardizem CD Antitrust Litig., 200 F.R.D. 297 (E.D. Mich. 2001); and* Meijer, Inc. v. Warner Chilcott Holdings, Co., *246 F.R.D. 293 (D.D.C. 2007).*

ple statement, however, masks ambiguity and uncertainty.

Consider the requirement of Rule 23(b)(3) that common issues must predominate over individual issues. The decision whether to certify a class in antitrust cases generally pivots on that element. Courts have recognized that common issues predominate if trial will involve evidence that is predominantly common to the class.[8]

But applying this standard is far from straightforward. Not only does the class certification decision turn on a prediction about how the trial will proceed, but plaintiffs and defendants disagree about what evidence will prove important at that later event. In part because in antitrust cases defendants tend to concede many issues are common—including proving the underlying violation—the key point of contention regarding certification can usually be distilled to a single issue regarding predominance: whether plaintiffs have evidence capable of showing that the class in general paid inflated amounts—overcharges—as a result of the alleged anticompetitive conduct.[9] This issue is often called common impact.

The dispute over common impact usually follows a basic framework. The key issue tends to be whether plaintiffs can prove impact through common evidence. The plaintiffs may put forward the testimony of an economist that the structure of the industry at issue causes the relevant prices to move up or down together and that a statistical analysis of pricing data demonstrates this correlation. The defendants may respond with their own expert who says that the structure of the industry causes variation in the movements of prices and that a statistical analysis of pricing data confirms that impact must be assessed individually for each class member. What is a court to do with this conflicting evidence at the class certification stage?

Under the emerging approach to class certification, courts apparently no longer reserve this "battle of the experts" for trial.[10] If a court believes that resolving a merits issue is necessary to determine whether a provision of Rule 23 has been satisfied, it may now be required to determine who is right. In other words: Have plaintiffs shown by a preponderance of evidence that their evidence is capable of showing common impact?

But invoking the preponderance of evidence standard for what plaintiffs must show to satisfy Rule 23(b)(3) is confusing in part because class certification even under the new approach is not supposed to involve proving the merits, but merely asks whether plaintiffs' case on the merits is capable of being made later with mostly common evidence. In this uncomfortable middle ground, the new standard seems to require the plaintiffs to prove, by a preponderance of the evidence, that they will be able to prove impact at trial using common evidence by a preponderance of the evidence. This standard verges on inscrutable. The reason may be that courts are attempting to use class certification as a filter to dispose of weak cases when it is ill suited to that particular task. In any event, assuming plaintiffs should have this burden at the class stage, as a practical matter how is a court to determine whether they have carried it?

One approach would be to accept a plausible showing that plaintiffs will *attempt* to prove class-wide impact at trial through predominantly common evidence.[11] After all, if the question is whether common evidence and issues will predominate at trial, it would seem logical to focus on the type of proof plaintiffs plan to use at trial to prove their case.[12] Plaintiffs' evidence might fail to persuade the jury, of course, but by that time the trial is over.

Whether the courts have abandoned this "plausibility" approach is unclear. Consider case law in the Third Circuit, which has played a leading role in developing the class certification standard in antitrust cases. In *Linerboard*, it appeared to adopt the plausibility standard.[13] In *Hydrogen Peroxide*, while not abandoning *Linerboard*, it seemed to adopt a stricter evidentiary approach.[14] Most recently, in *Comcast*, the Third Circuit moved back toward the plausibility standard it had adopted in *Linerboard*.[15] The dust has yet to settle.

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Another possible approach is for the judge to decide whether plaintiffs' common evidence actually proves class-wide impact. But courts appear to have rejected this view. Even *Hydrogen Peroxide*, for example, took pains to say that courts should not resolve the ultimate issue at the class stage, but only whether plaintiffs' common evidence is "capable of proving" the issue at trial.[16] The Third Circuit re-emphasized this point in *Comcast*: "We are not the jury. Although in *Hydrogen Peroxide* we heightened the inquiry a district court must perform on the issue of class certification, nothing in that opinion indicated that class certification hearings were to become actual trials in which factual disputes are to be resolved."[17]

If neither plausibility nor proof of the merits is the right standard, what is? The courts have not made that clear. Nor did *Dukes* elucidate matters. The Court in *Dukes* quoted *Falcon* for the proposition that Rule 23 demands "rigorous analysis."[18] It borrowed from the same case to repeat the requirement of "significant proof." But those terms explain little. They are more like slogans than legal standards.

This lack of clarity has real costs. Lest plaintiffs fail to meet the new amorphous standard, they are delving ever further into the merits and putting on evidence at the class certification stage ever closer to the showing they will make at trial.[19] Similarly, lest trial court judges suffer reversal on appeal, they are undertaking ever more detailed analyses of the evidence at class certification, demanding ever more sub-

stantial showings, and conducting ever more involved hearings.[20] And defendants are pouring ever more resources into defeating class certification. The result is that the class certification process has become much more expensive and time-consuming for everyone. Moreover, and strangely, while in some ways class certification adjudications have come to resemble trials, at the same time they often involve highly detailed inquiries into issues that play virtually no role at trial. We turn to this odd mismatch next.

What Proportion of the Class Must Suffer Injury to Establish Common Impact? The recent questionable turn in class decisions has its roots, ironically, in the failure of courts which impose a heightened class certification standard to abide by one of their own central teachings: in assessing class certification, a court should focus on what the trial will be like.[21] The core of the predominance requirement—as the Third Circuit explained, for example, in *Hydrogen Peroxide*—is to "'consider how a trial on the merits would be conducted if a class were certified.'"[22] So important was this proposition that *Hydrogen Peroxide* quoted the following 2003 advisory committee note to Rule 23 not once but *twice*: "A critical need is to determine how the case will be tried."[23]

The failure to consider how antitrust cases are actually tried has lead courts astray in two significant ways. The first mistake is stating the plaintiffs' burden as if plaintiffs were required to show that class-wide evidence predominates as to each element of the claims to be tried, as opposed to the case as a whole. The second common error is characterizing the "common impact" requirement as plaintiffs' burden to present class-wide evidence capable of showing that "all or nearly all" class members suffered injury. But the issue of common impact plays little, if any, role at trial. Thus, isolating "common impact" as the key, and in some instances sole, inquiry on class certification runs afoul of the logic of *Hydrogen Peroxide* and other recent decisions appearing to ratchet up the burden at the class stage.

Common Issues Predominating Without Common Impact? The idea that plaintiffs must show that common issues predominate with respect to each element of a claim is divorced from the reality of trial. Rule 23(b)(3) asks whether "questions of law or fact common to class members predominate over any questions affecting only individual members." The plain language of the Rule appears to require only that common issues of law or fact would predominate with respect to the case as a whole, not regarding each element. Following this reasoning, the Second Circuit in *Cordes & Co. Financial Services v. A.G. Edwards & Sons* reversed a denial of class certification and instructed the district court to determine whether there were individual issues pertaining to proof of impact, and even if so, whether those issues would defeat predominance: "Even if the district court concludes that the issue of injury-in-fact presents individual questions, however, it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted."[24]

To see the logic of *Cordes*, consider an example. Plaintiffs demonstrate that proving an antitrust violation would be common to the class, and that proof of the violation will likely consume the vast majority of trial. In such circumstances, even if plaintiffs would not be able to prove impact with predominantly class-wide evidence, common issues are nonetheless likely to predominate at trial.[25]

Moreover, as a practical matter, class antitrust trials do not dwell on issues pertaining to the precise share of class members harmed. One reason may be that jury instructions and verdict forms do not require such proof. As to impact, jury instructions ordinarily ask only whether the antitrust violation caused harm to "the plaintiffs," "the class," or "class members."[26] Verdict forms might require a finding of injury to the "named plaintiffs" or ask whether "in addition to causing injury to the named plaintiffs, [defendants' conduct] caused the other members of the plaintiff class . . . to suffer injury to their business or property."[27] But courts do not require plaintiffs to prove at trial that *all* class members—or any specified proportion of the class members—suffered harm. Perhaps as a result, plaintiffs focus their efforts at trial on proving that defendants' conduct violated the antitrust laws and that the violations caused anticompetitive effects, such as artificially inflated prices. Defendants, for their part, spend the bulk of trial denying they engaged in the challenged conduct in the first place, contesting that the conduct would be anticompetitive, and refuting plaintiffs' damages model. Neither side, then, focuses on any pockets of the class that may not have suffered harm. Given that common impact is not an issue at trial, the intense focus on "common impact" at the class stage conflicts with the logic of emerging class certification jurisprudence.

Proportion of the Class Necessary for Common Impact? A handful of courts have also erred by appearing to require plaintiffs to produce class-wide evidence capable of showing some high proportion of the proposed class suffered harm to establish common impact. Because the focus of the predominance inquiry is supposed to be a prediction about the issues at trial, requiring common proof that all (or nearly all) class members were injured makes sense only if plaintiffs must actually satisfy that same test at trial. But, as pointed out above, antitrust class trials do not, in general, address the share of the class members harmed by the challenged conduct. So it is appropriate that most courts require only that common evidence can be used to show *widespread* injury to a class.[28] Consider Judge Posner's recent observation in affirming a grant of class certification in *PIMCO*:

> What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification . . . .[29]

Indeed, Posner's view finds some support in *Dukes*. The

Dukes Court described what is needed to show "commonality" under Rule 23(a) in ways quite similar to how courts discuss common impact in antitrust class actions. According to the Court, the plaintiffs' theory of commonality in *Dukes* depended on whether injury was an issue the class members had in common.[30] In evaluating the plaintiffs' expert evidence, the Court identified "the essential question" as being "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[31] The implication is that if the expert had been able to show that upwards of 95 percent of the class had suffered injury as a result of Wal-Mart's misconduct, the plaintiffs would have established commonality. If harm that is merely widespread can satisfy commonality, it should also suffice for impact to be a predominantly common issue.

Recognizing that evidence of widespread injury suffices for common impact makes sense, not only of the term "predominance" but also as a matter of policy. One possible concern about certifying classes that include many members who suffered no injury is the possibility of imposing excessive liability on a defendant. But this contention conflates two separate issues.

Often, a sophisticated statistical analysis can determine the total harm suffered by the class as a whole—usually the cumulative overcharges—caused by an antitrust violation. But it is not always as feasible to determine with precision the allocation of that harm among individual class members. Indeed, plaintiffs in antitrust class actions often provide an expert report purporting to show the total harm to the class, and defendants respond that such a demonstration can only reveal the average harm to class members but not that all—or most—class members were injured. Yet even if defendants are right, the important point is that the aggregate recovery the class seeks should not be affected by the inclusion of multiple uninjured class members.

For example, the expert may show through statistical analysis that, on average, defendants' conduct artificially inflated prices to class members by 10 percent. By multiplying that amount by the total sales to the class as a whole, an accurate assessment of the aggregate class-wide overcharges can be computed. That some members of the class paid overcharges in excess of 10 percent and others paid smaller overcharges, or none at all, would not affect the aggregate result in the slightest. Inclusion of uninjured entities or persons in the class, therefore, would not inflate the total class damages. If a similarly robust analysis were undertaken for a somewhat smaller class—one that eliminated unharmed class members—the average overcharge per class member would increase but the aggregate damages would remain the same.[32]

Moreover, allowing a class to contain uninjured members is not, as some have argued,[33] a violation of the Rules Enabling Act, which bars rules of civil procedure from modifying substantive rights.[34] The substantive right at issue is a defendant's right not to be exposed to increased damages, as a result of class certification, due to the presence of entities in the class that do not satisfy every element of the relevant cause of action. But that right is not violated by including uninjured class members because, as just shown, aggregate class damages in the antitrust context should not be increased by the presence of uninjured members.

In sum, a requirement at class certification that plaintiffs show they are capable of using common evidence to establish harm to all (or nearly all) class members is artificial, imposing an obstacle to class certification unrelated to plaintiffs' burden at trial.

A Sliding Scale? The lack of clarity about the predominance requirement in antitrust class actions has led to fuzzy analysis in other ways. Consider the interplay between the two points we just made. First, if issues other than impact predominate in litigation, then common issues may predominate even without common impact. Second, even if some common evidence of impact is necessary for class-wide issues to predominate, that evidence need not necessarily show impact to every class member; the requirement that common issues predominate does not mean that every issue must be common to every class member. For the most part, neither courts nor commentators have been precise enough in their reasoning to put a fine point on either of these issues. As a result, the next logical step has been lost: plaintiffs should not have to make the same showing of common impact in every case. If the issue of impact plays little or no role in litigation, common issues may predominate even if a relatively small proportion of a class suffered the relevant kind of injury. Courts rarely, if ever, recognize the possibility of a sliding scale along these lines. They sometimes seem to assume the same showing regarding common impact is necessary in every case. But that assumption does not withstand scrutiny.

Procedural Difficulties

The Evidence Necessary for Class Certification. The emerging class certification standard is a poor fit with how cases are currently litigated. A judge is supposed to rule on class certification "at an early practicable time."[35] Yet the more adjudicating class certification resembles a trial, the later in the proceeding it should occur. To the extent courts actually resolve merits issues or decide which expert is right in deciding whether to certify a class, as some courts have done,[36] plaintiffs face a more stringent evidentiary burden at the class stage than at summary judgment. Given this mixing of merits and class issues, the once common approach of bifurcating class and merits discovery no longer makes sense. Neither does requiring the parties to adjudicate class certification at an early stage and then summary judgment at a later stage, when many of the same issues (like the reliability and acceptability of plaintiffs' expert evidence) are at play. Further, plaintiffs should have some formal protection from being forced to address class certification prematurely, just as Rule 56(d) allows a challenge to a motion for summary judgment that is not yet ripe.

Judicial Usurpation of the Role of the Jury: A Seventh Amendment Violation?

Recent class certification decisions may implicate the Seventh Amendment. Plaintiffs seeking damages under federal antitrust law have a constitutional right to try their case to a jury. However, that right is meaningless if plaintiffs are forced to win their case twice: once before a judge and then again before a jury. Yet that is what a court in effect requires if it refuses to certify a class unless plaintiffs prove key elements of their claims to a judge's satisfaction. After all, the vast majority of actions brought on behalf of a proposed class cannot proceed without class certification. The stakes for the named plaintiffs are too low and the costs of prosecuting the action too high. Allowing judges to resolve merits issues in deciding whether to certify a class can thus violate the spirit of the Seventh Amendment.

It can also violate the letter of established Seventh Amendment doctrine. The Supreme Court long ago held in *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood* that if the same factual showing is relevant to a remedy at law—to which the right to trial by jury attaches—and a remedy in equity—to which no such right attaches—the court in addressing equitable relief must let the jury first decide the factual issues and then abide by those findings.[37] Class certification doctrine is equitable in nature. Thus, if courts are going to decide merits issues in rendering the equitable decision whether to certify a class, a plausible reading of the Seventh Amendment would require them to await and abide by the results of trial by jury.[38]

Justifications for Change

The primary justification for ratcheting up the class certification standard has been that class actions can result in abusive litigation. The reasoning usually runs somewhat along the following lines: plaintiffs bring meritless antitrust class actions; defendants settle just to avoid the costs of litigation or a tiny risk of an erroneous and catastrophic adverse judgment; and class counsel use the spoils to fund further meritless actions.[39] This reasoning finds scant evidentiary or theoretical support.

There has never been any persuasive study demonstrating that meritless class actions occur with any frequency or, if they do, that defendants agree to settle them. Charles Silver's article, *"We're Scared to Death": Class Certification and Blackmail*,[40] makes a persuasive argument that the evidence simply does not support the claim that class certification coerces defendants into settlement. True, certification does tend to increase the amount defendants are willing to pay in settlement. But that is likely because in the vast majority of proposed class actions, without certification defendants can escape liability for a potentially serious legal wrong. Individual actions simply would not be feasible for many or most class members. The real problem, to paraphrase Jonathan Landers' article, may be legalized theft rather than legalized blackmail.[41]

Plaintiffs seeking damages under federal antitrust law have a constitutional right to try their case to a jury. However, that right is meaningless if plaintiffs are forced to win their case twice: once before a judge and then again before a jury.

The reality is that defendants in antitrust class actions generally are large, well-funded corporations. They have a high tolerance for risk, the capital to fund protracted litigation and to pay for high-quality counsel, and the benefit of the interest-free use of money until they ultimately pay to resolve a legal action.[42] Moreover, although we do not doubt that defense attorneys on the whole act in a highly ethical manner, they generally get paid by the hour, so they have little incentive to discourage their clients from pursuing all opportunities to prevail in class litigation. On the other hand, plaintiffs in class actions—and the attorneys who represent them—have more limited resources. Although plaintiffs' attorneys no doubt are also on the whole committed to the best interests of their clients, funding the substantial costs of litigation is expensive and puts significant pressure on them to settle. And plaintiffs' attorneys generally receive a higher return per hour by settling early, even for a modest amount, than they do from obtaining a larger settlement late in the litigation process. As a result, it is far more plausible that class action lawyers may be tempted to accept settlements that are too small rather than to demand recoveries that are too large. This problem is only exacerbated by raising the costs, risks, and burdens of obtaining class certification.[43] And the problem is significant given the crucial role private enforcement plays in compensating victims[44] and deterring antitrust violations.[45]

Practical Considerations

The emerging standard for class certification in antitrust cases has practical implications for practitioners and judges. First, it seems to signal the end to the practice of "bifurcating" class and merits discovery—a practice that tended to interpose delay and cause wasteful disputes about whether certain evidence pertained to "class" or "merits" issues. Second, to the extent courts must now delve more deeply into the merits to decide class certification, it may make sense in many cases for the parties to adjudicate class motions *after* the close of fact and expert discovery on the merits. This is fairer to plaintiffs because it relieves them of having to file class motions through which their evidence is subjected to rigorous scrutiny before they have the opportunity to develop their case fully. Moreover, it could eliminate the need for parties to produce two rounds of expert reports on some of the very same topics-one set at the class certification stage and

then another on the merits. Instead of predicting what plaintiffs' trial evidence will look like at an early stage of the case, the court could examine the fully formed economic and other proof that plaintiffs actually plan to present to the jury. Under the circumstances of a heightened standard, such a practice would be more efficient, less costly, and potentially fairer.

On the other hand, delaying the class certification decision until summary judgment or trial would protract a period of uncertainty about the stakes in litigation and prevent class members from obtaining notice of the action until the onset of trial. But, in our view, these concerns are reasons to retain the traditional class certification standard, not to adopt a new one and force the class determination to occur earlier in the litigation than makes procedural sense given the new set of rules. To quote the Supreme Court in *Eisen*, an early determination of factual issues on the merits as part of class certification risks prejudicing the parties "since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials."[46] In our view, the wisdom of *Eisen* has been reaffirmed in light of recent judicial experiments with raising the class certification standard. Given the resulting difficulties, one might expect courts to retreat from the most aggressive readings of recent case law. That retreat might be underway, as evidenced by the Third Circuit's decision in *Comcast*. If so, it is a noble retreat, discretion being the better part of valor.

[1] 417 U.S. 156 (1974).

[2] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[3] Behrend v. Comcast Corp., No. 2-03-cv-06604, 2011 U.S. App. LEXIS 17524, at *56–57 n.12 (3d Cir. Aug. 23, 2011).

[4] The *Comcast* Court noted that requiring plaintiffs to prove their case at the class stage "contravenes *Eisen* and runs dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury's factual findings with our own." *Id.* at 46; *see also id.* at 46 n.10 (citing, e.g., Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 970 (2010)).

[5] For further discussion of these problems, see Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. 355 (2009).

[6] *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) ("[D]enying or granting class certification 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 defendants) . . . .") (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001)).

[7] *Id.* at 320 ("Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.") (citing Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008)).

[8] *See, e.g.*, *id.* at 311 ("Issues common to the class must predominate over individual issues . . . .") (quoting *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 313–14 (3d Cir. 1998).

[9] Hal J. Singer, *Economic Evidence of Common Impact for Class Certification in Antitrust Cases: A Two-Step Analysis*, ANTITRUST, Summer 2011, at 34; *Hydrogen Peroxide*, 552 F.3d at 310 ("Only the predominance requirement is disputed in this appeal.").

[10] *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 323.

[11] *See Linerboard*, 305 F.3d at 152 (affirming district court's determination that it "need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law."); *see also Comcast*, 2011 U.S. App. LEXIS 17524 at *40 ("'plausible in theory' and 'susceptible to proof at trial through available evidence common to the class'") (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

[12] *See* Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935 (2009).

[13] *Linerboard*, 305 F.3d at 162–63 (holding sufficient for class certification that plaintiffs had made a plausible showing that common issues of fraudulent concealment predominated over individual issues).

[14] *Hydrogen Peroxide*, 552 F.3d at 325 (holding that plaintiffs must also show that class-wide impact is susceptible to proof at trial through available evidence common to the class in addition to showing that class-wide impact is plausible in theory for purposes of class certification).

[15] *Comcast*, 2011 U.S. App. LEXIS 17524 at *40 (we determine that the antitrust impact Plaintiffs allege is "plausible in theory" and "susceptible to proof at trial through available evidence common to the class.") (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

[16] *Hydrogen Peroxide*, 552 F.3d at 311.

[17] *Comcast*, 2011 U.S. App. LEXIS 17524 at *45.

[18] *Dukes*, 131 S. Ct. at 2551 (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982)).

[19] *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 96 (D. Conn. 2009) (noting that full merits discovery was completed and expert reports submitted at time of class certification ruling).

[20] Behrend v. Comcast Corp., 264 F.R.D. 150, 154 (E.D. Pa. 2010) (noting rigorous analysis of expert reports and four-day evidentiary hearing prior to class certification ruling).

[21] *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311 n.8; *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6 (1st Cir. 2008).

[22] *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311 n.8 (citing Sandwich Chef, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003) (Rule 23(b)(3) requires the court to "consider how a trial on the merits would be conducted if a class were certified")); *id.* at 317 (court may at the class certification stage "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial of those issues would take") (citing *Newton*, 259 F.3d at 166).

[23] *Id.* at 312, 319.

[24] Cordes & Co. Fin Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 108 (2d Cir. 2007).

[25] *Id.* ("The question of injury-in-fact, which in this case is equivalent to whether a particular plaintiff would have paid more in the but-for world, may not be common. We do not discount the possibility that the individual questions raised by injury-in-fact might then predominate over the several common questions. Perhaps a trial would focus largely on what particular plaintiffs would have paid in the but-for world. But that is not necessarily so.").

[26] Davis & Cramer, *supra* note 4, at 992 n.127 (citing several verdict forms in antitrust trials).

[27] *Id.* at 971 n.19 (citing Special Verdict Form at 1–7, *In re* Scrap Metal Antitrust Litig., No. 1:02cv0844 (N.D. Ohio Feb. 9, 2006)).

[28] *See* Davis & Cramer, *supra* note 4, at 993 n.133 (citing *Cardizem*, 200 F.R.D. at 321 ("Courts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class."); *In re* Urethane Antitrust Litig., 251 F.R.D. 629, 638 (D. Kan. 2008 (evidence of a standardized pricing structure establishing artificially inflated baseline provides generalized proof of class-

wide impact); *Meijer*, 246 F.R.D. at 310 (finding widespread injury sufficient for class certification purposes)).

[29] Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009).

[30] *Dukes*, 131 S. Ct. at 2551.

[31] *Id.* at 2553–54.

[32] For a further argument that class actions can produce smaller errors than the aggregate of individual litigation see Joshua P. Davis, Class-Wide Recoveries (Feb. 1, 2011), *available at* http://ssrn.com/abstract=1768148.

[33] Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, ANTITRUST, Summer 2007, at 61.

[34] The Rules Enabling Act provides that rules of civil procedure may not "abridge," "enlarge," or "modify" "any substantive right." 28 U.S.C. § 2072(b).

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

[36] *In re* Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163, 175 (E.D. Pa. 2007) (comparing testimony of plaintiffs' and defendants' experts); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 235 F.R.D. 127, 138 (D. Me. 2006) (holding in favor of plaintiffs' expert testimony on proof of impact following testimony from plaintiffs' and defendants' experts).

[37] Beacon Theatres v. Westover, 359 U.S. 500, 510–11 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962).

[38] For development of this argument see Davis & Cramer, *supra* note 4, at 1010–33.

[39] *See, e.g.*, CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 723 (7th Cir. 2011) ("Certification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit."); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002) ([a class-action settlement] "reflects the risk of a catastrophic judgment as much as, if not more than, the actual merits of the claims."); *Hydrogen Peroxide*, 552 F.3d at 310 ("denying or granting class certification 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 defendants) . . . .") (quoting *Newton*, 259 F.3d at 162).

[40] Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

[41] Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974).

[42] Plaintiffs are generally not entitled to pre-judgment interest in antitrust cases.

[43] For further development of this argument see Davis & Cramer, *supra* note 4, at 978–81.

[44] For a discussion of these benefits from private enforcement, see Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008) (relying on Robert H. Lande & Joshua P. Davis, *Benefits from Antitrust Private Enforcement: Forty Individual Case Studies* (2008), *available at* http://ssrn.com/abstract=1105523).

[45] For a discussion of the deterrence effects of private antitrust enforcement, see Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315.

[46] *Eisen*, 417 U.S. at 178.