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Foreword

by William B. Michael *Paul, Weiss, Rifkind, Wharton & Garrison LLP*

Approximately one year ago, on June 20, 2011, the United States Supreme Court ruled that "one of the most expansive class actions ever" had been improperly certified under Federal Rule of Civil Procedure 23(a) and (b). The case, *Wal-Mart v. Dukes*, involved employment discrimination claims under Title VII – asserted on behalf of a putative class of 1.5 million current and former female employees of Wal-Mart. But the Court's decision established standards applicable to class certification in all types of cases, including antitrust.

This issue of *The Antitrust Practitioner* features three intriguing and insightful articles that address various aspects of class certification in the wake of *Wal-Mart*.

Robert J. Katerberg and Adam Linker survey developments in the lower courts in the year since the Supreme Court decided *Wal-Mart* and *AT&T Mobility v. Concepcion*, a case that involved the validity of class arbitration waivers. They take on the question of whether the Supreme Court's rulings have had the anticipated effect of foreclosing many class actions at a preliminary stage, focusing on antitrust and consumer protection cases. The answer, they find, is a mixed bag. The *Wal-Mart* decision may have affected the outcome of class certification in a limited number of cases on the margins. But, the authors conclude, most courts have not changed the way they apply the elements of Rule 23. Similarly, while *Concepcion* directly overturned a California rule holding that class arbitration waivers are unconscionable and thus unenforceable, some lower courts have found that the decision does not render such waivers enforceable *per se* but instead have taken a case-by-case approach to the issue. Though it may be too early to assess the true impact of these decisions on class certification in the lower courts, Katerberg and Linker show that results thus far defy broad generalization.

Wesley R. Powell and G. Shireen Hilal focus on a district court case in which the Supreme Court's ruling in *Wal-Mart* does appear to have had a decisive impact. The case, *In re Live Concert Antitrust Litigation*, involved several class actions alleging that Clear Channel had restrained competition in various regional markets for live music concerts. A federal district court in California certified five such classes in 2007. But, this year the court re-visited that decision, noting that it was based on a legal standard no longer in effect following *Wal-Mart*. The procedural context of *In re Live Concert* is significant in that the court had before it a dispositive motion for summary judgment as well as a motion to strike the testimony of plaintiffs' expert under Rule 702 and *Daubert* – both of which it granted – in addition to a motion to decertify the class, which it denied as moot. Nevertheless, the court's opinion makes clear that its approach to class certification following *Wal-Mart* would be substantially different, and more rigorous, than in the past.

One anticipated effect of *Wal-Mart* in the antitrust context is that courts will place increasing emphasis on, and will more closely scrutinize, the testimony of expert economists at the class certification stage. Michael Noel and Parker Normann discuss the types of economic evidence they believe should, and should not, pass muster for assessing common, class-wide impact. Noel and Normann argue that economic tools traditionally used in the service of product and geographic market definition are ill-suited to the task of proving common impact. A market definition analysis, they contend, is not a reliable substitute for actual, direct evidence of a class-wide impact on competition. As courts are increasingly asked to weigh competing expert testimony at the class certification stage in antitrust cases, this is the type of issue (perhaps avoidable in the past) with which they will be squarely confronted.

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The Impact of Wal-Mart *and Concepcion on Antitrust and Consumer Protection Class Actions: A Brief Survey of Recent Developments in the Lower Courts*

by Robert J. Katerberg and Adam Linkner *Arnold & Porter LLP*[1]

Within a period of a couple months last year, the Supreme Court decided two important cases dealing with class action law and procedure. In *Wal-Mart Stores, Inc. v. Dukes*,[2] the Court reversed the lower courts' certification of one of the largest classes ever, instilling new rigor into Federal Rule of Civil Procedure 23's standards for class certification and repudiating the notion of "Trial by Formula." And in *AT&T Mobility LLC v. Concepcion*,[3] the Court held that federal law preempts state law doctrines against enforcing class arbitration waivers in consumer contracts. Both decisions were perceived as a boon to class action defendants. Indeed, some commentators reacted to these decisions by proclaiming, for better or for worse, the end of the class action as we know it.[4]

With about a year having passed, we set out to examine how much practical impact *Wal-Mart* and *Concepcion* have had in the lower courts in two particular types of cases that historically have been fertile territory for class actions: antitrust and consumer protection.[5] Has the anticipated paradigm shift come to pass, or is it business as usual for lower courts deciding class action issues?

Wal-Mart v. Dukes

The Case

Wal-Mart was an employment discrimination action by a putative class of 1.5 million employees, making it reportedly one of the largest classes in history, and certainly the largest employment class. Plaintiffs claimed sex discrimination and sought injunctive and declaratory relief, backpay, and punitive damages. The district court certified the class under Federal Rule of Civil Procedure 23(b)(2) even though that provision is designed for classes seeking injunctive and declaratory relief, whereas the *Wal-Mart* plaintiffs were seeking the monetary remedy of backpay. The Ninth Circuit largely affirmed the certification, reasoning that plaintiffs' backpay claims were appropriate in a Rule 23(b)(2) case because they did not "predominate" over the requests for declaratory and injunctive relief. The Ninth Circuit also held that plaintiffs met the "commonality" requirement of Rule 23(a) and that liability and damages could be determined for a sample subset of the class members with the result extrapolated to the class as a whole.

The Supreme Court reversed, with Justice Scalia writing the opinion. In one part of the opinion, which was joined by all nine Justices, the Court held that Rule 23(b)(2) generally does not permit certification of claims for backpay or other monetary relief.[6] All nine Justices further agreed that it was improper to replace the individualized proceedings necessary for backpay determinations with what the Court termed "Trial by Formula."[7] In short, "individualized monetary claims belong in Rule 23(b)(3)," which has stricter standards for certification.[8]

In a separate part of the opinion joined by a bare majority of five Justices, the Court also held that plaintiffs failed to meet Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class," often known as the "commonality" inquiry.[9] The Court explained that while "any competently crafted class complaint literally raises common questions," to count for purposes of Rule 23(a)(2) a common question "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."[10] What matters is not common questions *per se*, but "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation" after taking into account "[d]issimilarities within the proposed class" that may "impede"

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2 131 S. Ct. 2541 (2011).

3 131 S. Ct. 1740 (2011).

4 *See, e.g.*, David Schwartz, *Do-it-yourself tort reform: How the Supreme Court quietly killed the class action,* SCOTUSblog (Sept. 16, 2011, 10:52 AM), http://www.scotusblog.com; Opinion, *A Death Blow to Class Actions?*, N.Y. TIMES, June 20, 2011; Nathan Koppel, *What Does Wal-Mart Ruling Mean for Class Actions?*, WALL ST. J., June 20, 2011; Jonathan Gertler and Christian Schreiber, AT&T Mobility v. Concepcion, *The death knell for class actions?*, PLAINTIFF MAGAZINE, June 2011.

5 *See, e.g., Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625 (1997) (observing that Rule 23 requirements are "readily met in certain cases alleging consumer . . . fraud or violations of the antitrust laws"); *In re Aftermarket Auto. Prods. Antitrust Litig.*, 276 F.R.D. 364, 368 (C.D. Cal. 2011) ("cases involving horizontal price-fixing are, as a practical matter, often certified").

6 *Wal-Mart*, 131 S. Ct. at 2557-60.

7 *Id.* at 2561.

8 *Id.* at 2558.

9 *Id.* at 2550-57.

10 *Id.* at 2551 (internal quotation marks and alteration omitted).

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such common answers.[11] The plaintiffs' evidence of classwide discrimination, resting largely on regression analysis and statistical and sociological experts, failed to meet that standard.

The Court's focus on Rule 23(a)(2)'s "commonality" requirement seemed to mark a departure from the prevailing approach taken by the lower courts, which had generally found "commonality" an easily satisfied, even pro forma, requirement. Indeed, Justice Ginsburg, dissenting from that part of the opinion on behalf of herself and three other Justices, criticized the majority's approach for "blend[ing] Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3)," in particular the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members."[12] Justice Ginsburg reminded the majority that "even a single question of law or fact common to the members of the class will satisfy the commonality requirement."[13] The majority addressed this criticism by agreeing that "a single question of law or fact" may be sufficient, but further stating that "[b]ecause respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, … they have not established the existence of *any common question*."[14] This exchange tends to leave the exact nature of the post-*Wal-Mart* "commonality" requirement somewhat indeterminate: one common question may be enough, but it has to be "central to the validity of each one of the claims" and "apt to drive the resolution of the litigation," and dissimilarities between class members can make an otherwise common question insufficient. We know little more about what suffices to meet this refined "commonality" standard than that the evidence in *Wal-Mart* did not.

The *Wal-Mart* majority also emphasized that the necessary "rigorous analysis" of class certification will frequently "entail some overlap with the merits of plaintiff's underlying claim," and that such an overlap is no reason not to conduct the analysis.[15] In so holding, the Court repudiated a widely held misunderstanding of one of its earlier opinions, *Eisen v. Carlisle & Jacquelin*, which many lower courts had read as discouraging consideration of overlapping issues when deciding class certification.[16] In addition, the majority expressed "doubt" about the lower courts' belief that the rigorous standards for admission of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[17] did not apply at the class certification stage, although it did not make a square holding on this point.[18]

The Aftermath

Wal-Mart v. Dukes has not lacked for citation. As of the writing of this article, it had racked up citations in over 400 decisions of state and federal courts.[19] But a close review of post-*Wal-Mart* class action jurisprudence in the antitrust and consumer protection areas presents a mixed picture. First, courts are still frequently certifying classes, and when they do, they usually treat *Wal-Mart* as little more than a speed bump. In particular, courts do not seem to be applying the Rule 23(a) "commonality" requirement any differently than they did before *Wal-Mart*. Ironically enough, some courts have even invoked *Wal-Mart* as *support* for certifying an antitrust or consumer protection class. Second, when courts deny certification of antitrust and consumer class actions, *Wal-Mart* usually plays only a minor part in the analysis. These are, by and large, cases in which certification would have been denied anyway, even pre-*Wal-Mart*. We found only a couple of district court decisions in which *Wal-Mart* may have played an outcome-determinative role.

1. Post-*Wal-Mart* Decisions Certifying Antitrust and Consumer Protection Classes

In the months following *Wal-Mart*, the Third and Seventh Circuits have issued several major antitrust decisions holding in favor of certification. Neither court seemed to perceive *Wal-Mart* as much of an obstacle at all.

Most notably, in *Sullivan v. DB Investments, Inc.*,[20] the *en banc* Third Circuit reversed an earlier (pre-*Wal-Mart*) panel ruling and affirmed the certification of a settlement class in an antitrust case alleging cartelization of international diamond markets by DeBeers.[21] Far from an obstacle, the *Sullivan* court actually saw *Wal-Mart* as affirmatively *supporting* certification in the antitrust context:

> *Dukes* actually bolsters our position, making clear that the focus is on whether the defendant's conduct was common as to all of the class members, not on whether each plaintiff has a "colorable"

11 *Id.* (emphasis in original and internal quotation marks omitted).

12 *Id.* at 2565-66 (Ginsburg, J., concurring in part and dissenting in part) (internal quotation marks omitted).

13 *Id.* at 2562 (Ginsburg, J., concurring in part and dissenting in part) (alteration and internal quotation marks omitted).

14 *Id.* at 2556-57 (emphasis added).

15 *Id.* at 2551-52.

16 *Id.* at 2552 n.6 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

17 509 U.S. 579 (1993).

18 *Wal-Mart*, 131 S. Ct. at 2553-54.

19 Westlaw Search on April 24, 2012.

20 667 F.3d 273, 286 (3d Cir. 2011).

21 Although settlement classes present several unique issues and considerations, they still have to meet the requirements of Rule 23, *see generally Amchem Prods. Inc. v. Windsor,* 521 U.S. 591 (1997), and decisions regarding certification of settlement classes thus have potential precedential value in non-settlement class certification cases as well.

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> claim. In *Dukes*, the Court held that commonality and predominance are defeated when it cannot be said that there was a common course of conduct in which the defendant engaged with respect to each individual. But commonality is satisfied where common questions generate common answers "apt to drive the resolution of the litigation." 131 S. Ct. at 2551. That is exactly what is presented here, for the answers to questions about De Beers's alleged misconduct and the harm it caused would be common as to all of the class members, and would thus inform the resolution of the litigation if it were not being settled.[22]

This counterintuitive use of *Wal-Mart* to *support* certification drew a strongly worded dissent from two judges of the Third Circuit, who criticized "the Majority's practically limitless definition of commonality" as being in "stark contrast" to "the measured definition provided by the Supreme Court in its recent decision in [*Wal-Mart*]."

Though *Sullivan* involved certification of a *settlement* class, the same Circuit also recently affirmed certification of a *litigation* antitrust class. *Behrend v. Comcast Corporation*[24] involved claims by a class of cable subscribers that their rates had been inflated due to monopolistic conduct. The court proceeded directly to the Rule 23(b)(3) predominance question without addressing commonality, and *Wal-Mart* was relegated to a few terse footnotes in a lengthy, complex opinion. For example, addressing Comcast's reliance on *Wal-Mart* in rebutting the plaintiffs' expert, the court simply said: "The factual and legal underpinnings of *Wal-Mart* – which involved a massive discrimination class action and different sections of Rule 23 – are clearly distinct from those of this case. *Wal-Mart* therefore neither guides nor governs the dispute before us."[25]

Similarly, the Seventh Circuit in *Messner v. Northshore University Healthsystem*[26] vacated a pre-*Wal-Mart* district court ruling denying certification of a class of hospital patients and third-party payors challenging a hospital merger on antitrust grounds. The Seventh Circuit barely mentioned *Wal-Mart*, proceeding directly to the predominance inquiry under Rule 23(b)(3) without even addressing commonality. Ironically, like the Third Circuit in *Sullivan,* the *Messner* court actually turned *Wal-Mart* against the defendants. In what might strike some as a logical leap, the court cited *Wal-Mart*'s statement that it is "clear that individualized monetary claims belong in Rule 23(b)(3)" rather than Rule 23(b)(2) as support for the proposition that "[i]t is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)."[27]

District courts deciding whether to certify antitrust classes have been equally undeterred by *Wal-Mart*. Just weeks after *Wal-Mart,* a district court in California certified an antitrust class in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*.[28] The court stated that "[t]o the extent that Defendants are arguing that *Wal-Mart Stores* categorically precludes certification in this case, they overreach."[29] In contrast to the inability of the *Wal-Mart* plaintiffs to show a general policy of discrimination, the court explained, "the existence of a 'general policy' of price-fixing is – at least for purpose of this motion – undisputed" and that "[n]othing in *Wal-Mart Stores* suggests that Plaintiffs will inevitably be unable to present" common proof of impact and damages "resulting from this alleged policy."[30] The defense also failed to persuade the judge that *Wal-Mart*'s rejection of regression analysis to show a common policy of discrimination precluded the use of regressions to support certification in an antitrust case.[31] Likewise in *In re Apple iPod iTunes Antitrust Litigation*,[32] the court certified an antitrust class of iPod purchasers in an opinion in which practically the only mention of *Wal-Mart* was to note that the court had requested supplemental briefing on its impact.[33]

Nor have courts perceived *Wal-Mart* as an obstacle to certification in consumer protection cases. A typical example is a post-*Wal-Mart* California district court decision refusing to decertify a class action against Yoplait for allegedly misrepresenting health benefits of yogurt.[34] The court explained:

> Unlike in *Wal-Mart*, where the injury suffered, discrimination, happened at the hands of different supervisors in different regions without the link of a common practiceor policy, any injury suffered by a class member in this case stems from a common core of salient facts. The class members all assert they were misled by a common advertising campaign that had little to no variation.

22 *Sullivan,* 667 F.3d at 299-300.
23 *Id.* at 344 (Jordan, J., dissenting).
24 655 F.3d 182 (3d Cir. 2011), *cert. granted,* No. 11-864 (U.S. June 25, 2012).
25 *Id.* at 203 n.12.
26 669 F.3d 802 (7th Cir. 2012).
27 *Id.* at 815.
28 276 F.R.D. 364 (C.D. Cal. 2011).
29 *Id.* at 369.
30 *Id.*
31 *Id.* at 371-72.
32 2011 WL 5864036 (N.D. Cal. Nov. 22, 2011).
33 *Id.* at *2.
34 *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 521 (C.D. Cal. 2011).

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> Here there is a unitary message, which Mr. Johnson claims is fraudulent, that *Wal-Mart* lacked, and thus class certification is warranted under the standard set forth in *Wal-Mart*.[35]

To the same effect is *In re Motor Fuel Temperature Sales Practices Litigation*,[36] where gasoline purchasers sued owners and operators of gas stations in Kansas for allegedly misrepresenting the volume of fuel being sold. The court had certified classes in 2010 but after *Wal-Mart,* defendants asked the court to decertify the classes. The court made some refinements, including restructuring the class as a Rule 23(b)(3) class, but rejected defendants' commonality argument, explaining that:

> This case . . . is very different from *Dukes*. Here, plaintiffs allege a common practice by all defendants that applied to the entire class uniformly. They thus allege the same injury. Like *Dukes*, this case involves a large class. Unlike *Dukes*, class member claims do not turn on a kaleidoscope of variables – different jobs at different levels with different supervisors in 50 different states governed by different regional [policies]. This case involves a single practice that defendants allegedly implemented uniformly with respect to all class members.[37]

And in *Carrera v. Bayer Corp.*,[38] a federal court similarly found the commonality requirement satisfied by allegations that a multivitamin manufacturer made misleading claims about its product's ability to enhance metabolism.[39]

> 2. Post-*Wal-Mart* Decisions Denying Certification of Antitrust and Consumer Protection Classes

To be sure, courts have also denied certification in some antitrust and consumer protection cases. But that is nothing new; courts sometimes denied certification before *Wal-Mart* as well, particularly in the last decade as a trend toward greater scrutiny of class certification took hold in the lower courts. It is difficult to conclude from an examination of recent decisions that *Wal-Mart* is driving courts to deny certification in cases where certification would previously have been granted.

A leading example is the Ninth Circuit's recent decision in *Mazza v. American Honda Motor Co.*[40] The court vacated a district court's certification of a nationwide class of auto purchasers suing Honda for alleged false advertising. However, at the stage of addressing Rule 23(a)'s requirements, *Mazza* actually *distinguished Wal-Mart*, holding that the *Mazza* plaintiffs, unlike the *Wal-Mart* plaintiffs, satisfied commonality. The Ninth Circuit emphasized that "commonality only requires a single significant question of law or fact" and that the countervailing presence of individualized issues relates only to Rule 23(b)(3)'s predominance requirement, "not to whether there are common issues under Rule 23(a)(2)."[41] This language minimizing the significance of commonality practically seems like it could have been transplanted from Justice Ginsburg's *dissent* in *Wal-Mart*.[42] It is notable that the Ninth Circuit found commonality satisfied despite stating later in its opinion – under the rubric of "predominance" – that "many class members were never exposed to the allegedly misleading advertisements, insofar as advertising of the challenged system was very limited."[43] Ultimately, the Mazza court found predominance lacking both for that reason and because the claims would depend on a multiplicity of different states' laws, but that part of the analysis had nothing to do with *Wal-Mart*.

A recent decision of the Northern District of California court followed the same pattern. In *In re Google AdWords Litigation*,[44] a putative class of advertisers sued Google for allegedly misrepresenting the quality of websites where ads were to appear. Like the *Mazza* court, the *Google* court held the plaintiffs to a rather low bar of simply articulating *one* common question: "whether Google's alleged omissions were misleading to a reasonable AdWords customer."[45] Here, again, the court ultimately denied certification due to plaintiffs' failure to meet the predominance requirement under Rule 23(b)(3), but that analysis rested entirely on pre-*Wal-Mart* jurisprudence.

In a recent consumer protection case involving an allegedly fraudulent healthcare discount membership program, *Pilgrim v. Universal Health Card, LLC*,[46] the Sixth Circuit gave an unusual endorsement of the defense tactic of moving to deny class certification on the pleadings (as opposed to waiting for a class motion by plaintiffs). But it is striking how little *Wal-Mart* had to do with that significant result. The court held that plaintiffs' class allegations flunked Rule 23's requirements because different state

35 *Id.* at 521.

36 2012 WL 205904 (D. Kan. Jan. 19, 2012).

37 *Id.* at *14.

38 2011 WL 5878376 (D.N.J. Nov. 22, 2011).

39 *Id.* at *7-*8.

40 666 F.3d 581 (9th Cir. 2012).

41 *Id.* at 589.

42 *See Wal-Mart,* 131 S. Ct. at 2562, 2656-66 (Ginsburg, J., concurring in part and dissenting in part) (criticizing the majority for "import[ing] into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment").

43 *Mazza,* 666 F.3d at 594-95.

44 2012 WL 28068 (N.D. Cal. Jan. 5, 2012).

45 *Id.* at *12·

46 660 F.3d 943 (6th Cir. 2011).

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laws would govern claims of different members of the nationwide class and "[w]here and when featured providers offered discounts is a prototypical factual issue that will vary from place to place and from region to region."[47] For the latter proposition, the court cited *Wal-Mart*, but only as a "cf.," and prior case law would have amply supported the proposition.[48]

A recent opinion by the New Jersey federal district court, *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*,[49] further exemplifies how *Wal-Mart* has tended to play a confirmatory – rather than determinative – role in recent decisions denying certification in consumer protection cases. The claim was that consumers overpaid for so-called 15-passenger vans that allegedly were not really fit for transporting 15-passengers. The opinion denying certification on predominance grounds contains a lengthy discussion rejecting plaintiffs' argument "that the Supreme Court's decision in *Eisen* forbids merits inquiries at the class certification stage."[50] Although *Wal-Mart* itself directly obliterates that argument, the court relied mainly on the Third Circuit's pre-*Wal-Mart* decision in *In re Hydrogen Peroxide Antitrust Litigation*,[51] only mentioning at the end of the discussion that "the Supreme Court's decision in [*Wal-Mart*] is consistent with the *Hydrogen Peroxide* rule."[52]

The plaintiffs in *E-350* also tried to recast their monetary claims as equitable claims accompanied by "incidental damages" amenable to certification under Rule 23(b)(2) – another tactic squarely repudiated by *Wal-Mart*.[53] Here, again, rather than relying directly on *Wal-Mart*, the New Jersey court denied Rule 23(b)(2) certification based primarily on pre-*Wal-Mart* Third Circuit jurisprudence holding that (b)(2) claims must be "cohesive."[54] In the process, the court grappled with whether "*Wal-Mart* casts a cloud over the continued application of the Third Circuit's cohesion requirement," ultimately holding that "to the extent that *Wal-Mart* abrogates the existing Circuit rule regarding cohesion, . . . (b)(2) certification is nevertheless inappropriate, simply because the monetary damages sought by Plaintiffs are not incidental to a claim for injunctive relief."[55]

In this way, *Wal-Mart* ended up being essentially a backstop for a result that it arguably dictated at the outset.

In antitrust cases, too, courts that have denied certification since *Wal-Mart* also have tended to invoke mostly pre-*Wal-Mart* concepts and jurisprudence. For example, in *In re Florida Cement and Concrete Antitrust Litigation,*[56] the district court denied certification of an indirect-purchaser antitrust class – but not because of any problem with commonality. Rather, the court found plaintiffs failed to meet Rule 23(a)'s typicality and adequacy requirements and Rule 23(b)(3)'s predominance requirement. In other words, the commonality requirement that *Wal-Mart* supposedly made more rigorous was one of the only hurdles that plaintiffs actually passed. In a brief discussion of commonality, the Florida court acknowledged *Wal-Mart*'s language about commonality but, drawing from pre-*Wal-Mart* Eleventh Circuit jurisprudence, proceeded to call it a "relatively light burden."[57]

We found just two cases so far in the antitrust/consumer protection area where Wal-Mart may have moved the needle. In *Kottaras v. Whole Foods Market, Inc.*,[58] a consumer class action alleging that a grocery store merger resulted in supra-competitive prices, the court relied on *Wal-Mart* in two significant ways in denying class certification. First, the court held that circuit precedent that "district courts should not scrutinize the probative value of evidence offered with respect to whether the requirements for class certification have been met" was abrogated by *Wal-Mart*.[59] Second, the court gave short shrift to plaintiff's fallback request for certification under Rule 23(b)(2), noting that "money damages are at the heart of this case" and that *Wal-Mart* has specifically repudiated the use of Rule 23(b)(2) classes for monetary relief.[60]

Second, in *In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*,[61] a federal court in Oklahoma declined to certify a class of cable subscribers in an antitrust tying case. *Wal-Mart* may have played a decisive role in that decision because it

47 *Id.* at 946-48.

48 *Id.* at 948. "*Cf.*" means that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (19th ed. 2010).

49 2012 WL 379944 (D.N.J. Feb. 6, 2012).

50 *Id.* at *7.

51 552 F.3d 305 (3d Cir. 2008).

52 2012 WL 379944, at *8.

53 *Id.* at *38.

54 *Id.* at *38 (citing, e.g., *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 147-49 (3d Cir. 1998)).

55 *Id.* at *38.

56 2012 WL 12382 (S.D. Fla. Jan. 3, 2012).

57 *Id.* at *4 (quoting *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009)).

58 2012 WL 259862 (D.D.C. Jan. 30, 2012).

59 *Id.* at *6 ("*In re Nifedipine*'s low hurdle for satisfying Rule 23(b)(3)'s predominance requirement now seems inconsistent with what the Supreme Court has articulated."); *see In re Nifedipine Antitrust Litig.*, 2009 U.S. App. LEXIS 3643, at *2 (D.C. Cir. 2009) ("the propriety of a district court's refusal to scrutinize the probative value of evidence proffered to demonstrate the requirements of Fed. R. Civ. P. 23 are satisfied is well-settled").

60 *Id.* at *11-*12.

61 2011 WL 6826813 (W.D. Okla. Dec. 28, 2011).

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seems to have led the district court to subject the plaintiffs' expert economist to greater scrutiny than otherwise would have applied. The court explained that "[p]rior to [*Wal-Mart*], the Court would have left [defense] critiques of [plaintiffs' expert's] application of this [economic] method for resolution at the *Daubert* motion stage. However, the Supreme Court recently suggested in dicta that *Daubert* applied to expert testimony at the class certification stage. . . . Therefore, the Court will evaluate [plaintiffs' expert's] use of the GRS Test in light of the requirements outlined in *Daubert* and its progeny."[62] While the court ultimately did not go so far as to exclude the testimony of the plaintiffs' expert, the extra scrutiny exposed several issues that showed the plaintiffs' theory was not conducive to common evidence.[63] On the other hand, even this court went out of its way to mention somewhat offhand that *Wal-Mart* did not alter the old "doctrine" that "doubts regarding whether certification is appropriate should be resolved in favor of certification."[64]

In these last two cases, then, *Wal-Mart* may have contributed tangibly to the outcome, but almost by accident. The propositions for which these courts cited *Wal-Mart* were not novel. The vast majority of federal courts nationwide long ago abandoned the canard that merits issues are out of bounds at the class certification stage, and were already sensitive to not letting Rule 23(b)(2) be a back door for monetary relief claims that belong, if at all, in Rule 23(b)(3). Most courts likewise had already begun applying *Daubert* or some form of scrutiny to expert opinion offered at the class certification stage. In one sense, then, *Wal-Mart*'s effect in *Kottaras* and *Set-Top Cable Television Box* could be seen as simply nudging the last few hold-out courts into the mainstream.

When one considers the precise legal holdings of *Wal-Mart* as opposed to the case's general aura, it is perhaps not surprising that its impact in consumer protection and antitrust cases has been minimal. First, as noted above, much of what *Wal-Mart* said about "rigorous analysis" of class certification and not shying away from overlap with the merits is not new, but merely the culmination of an overwhelming trend in the lower courts over the last decade. Second, *Wal-Mart* dealt with certification under Federal Rule of Civil Procedure 23(b)(2), but most antitrust and consumer class plaintiffs purely seek money damages and therefore pursue class certification under Federal Rule of Civil Procedure 23(b)(3). Third, the one real innovation *Wal-Mart* made – its ratcheting up of the Rule 23(a)(2) "commonality" requirement – may be structurally irrelevant to Rule 23(b)(3) classes to the extent Rule 23(b)(3)'s requirement that common questions of law and fact "predominate" remains more rigorous than Rule 23(a)(2)'s requirement that such common questions merely exist.[66] Particularly since *Wal-Mart*'s heightened version of "commonality" is somewhat elusive, courts are not reaching out to grapple with its meaning when the overarching "predominance" requirement makes it unnecessary to do so.

AT&T Mobility LLC v. Concepcion

The Case

Wal-Mart thus may play some role, albeit a limited one, in antitrust and consumer protection class actions that get to the certification stage, provided that defendants see the decision for what it is and do not try to overplay their hand. But the next decision we will examine, *Concepcion*, may have the effect of stopping many such cases in their tracks long before they get there – or at least so it was heralded at the time it was handed down.

Business defendants have long sought to steer customer disputes into arbitration as an alternative to litigation. This is typically accomplished by including arbitration provisions in contracts with purchasers of goods or services. The benefits of arbitration to business defendants are greatly magnified to the extent it prevents class actions. Plaintiffs' lawyers, however, have co-opted arbitration by importing class action procedures. So the latest battleground is whether arbitration provisions that specifically disallow class arbitration are enforceable. A number of state courts, most notably California,[67] have held such class arbitration waivers unconscionable as a matter of law, which means the claim can be pursued as an ordinary class action in state or federal court.

Enter the Supreme Court in *Concepcion*. AT&T had advertised that customers who purchased an AT&T service plan would receive a free phone. The Concepcions purchased one of those plans, which contained an arbitration provision that prohibited class proceedings, and received a phone at no charge. However, based on the phones' retail value they were charged $30.22 in sales tax. The Concepcions filed suit in California federal court alleging

62 *Id.* at *14.

63 *Id.* at *14-*16.

64 *Id.* at *16 & n.29.

65 *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Gariety v. Grant Thornton, LLP,* 368 F.3d 356 (4th Cir. 2004); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001).

66 Some courts have noted that "where an action is to proceed under Rule 23(b)(3), the commonality requirement is subsumed by the predominance requirement because it is far more demanding than the Rule 23(a)(2) commonality requirement." *McDonough v. Toys R Us, Inc.*, 638 F. Supp. 2d 461, 475 (E.D. Pa. 2009) (internal quotation marks omitted).

67 *Discover Bank v. Superior Court,* 36 Cal. 4th 148 (2005), *abrogated by Concepcion*, 131 S. Ct. at 179.

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that AT&T had engaged in false and fraudulent advertising by charging sales tax on free phones. The lower courts rejected AT&T's attempt to compel bilateral arbitration, holding that the class arbitration waiver was unconscionable under California's *Discover Bank* case.

The Supreme Court held that California's rule in *Discover Bank* was preempted by the Federal Arbitration Act ("FAA"). As in *Wal-Mart*, Justice Scalia wrote the Court's opinion for a bare majority of five Justices – the same five who joined the non-unanimous part of the *Wal-Mart* decision. The Court stated that the "principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms," and it looked unfavorably upon "the judicial hostility towards arbitration that prompted the FAA [and that] had manifested itself in a great variety of devices and formulas declaring arbitration against public policy."[68] Although the FAA allows "agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," that clause does not protect "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[69] The Court found California's *Discover Bank* rule to fall into the latter category. If a rule frustrates the contractual ability to "facilitate streamlined proceedings" – a fundamental attribute of arbitrations – then it is preempted by the FAA.[70] That ability is indeed frustrated, the Court explained, when a party is forced to switch from bilateral arbitration to class arbitration because class arbitration is less informal, requires procedural formality, and greatly increases risks to defendants. In a penultimate paragraph that leaves one wondering how integral it was to the Court's holding, the Court adds that because AT&T's arbitration contracts contained unusually consumer-oriented features (*e.g.*, payment of a minimum of $7,500 and double attorney's fees to claimants who obtain an arbitration award greater than AT&T's last settlement offer), holding the plaintiffs to their bilateral arbitration agreement was not likely to result in wrongs going unremedied.[71]

The Aftermath

A couple threshold observations about *Concepcion*'s impact are in order. First, in order for *Concepcion* to have any applicability at all, the transaction out of which a claim arises must be governed by a written contract, and that contract must contain an arbitration class with a class action waiver. Those requirements rule out its applicability to many types of consumer transactions, such as a typical retail purchase of a consumer good. *Concepcion* is most likely to be relevant to industries and markets where sellers and purchasers have continuing, long-term relationships that lend themselves to written contracts (*e.g.*, banks, credit cards, cellphones, etc.), or where one-time purchases involve sufficient stakes to warrant a contract (*e.g.*, automobiles). In those industries and markets where it is relevant, it may take time for *Concepcion*'s full impact to materialize because litigation arising out of contracts drafted or amended in reaction to *Concepcion* may not ripen into court decisions for a year or two. Nevertheless, there has been sufficient post-*Concepcion* litigation in the lower courts to allow us to spot some early trends.

Because *Concepcion* abrogated a California Supreme Court decision that had previously been binding in that state, an impact on consumer litigation in California was to be expected. These expectations have not gone unmet. For example, in *Chavez v. Bank of America*[72] the plaintiffs brought a class action against Bank of America and other financial institutions alleging that the plaintiffs had been enrolled in identity theft protection programs without their consent, in violation of both state and federal law. The defendants moved to compel bilateral arbitration based on arbitration agreements with the plaintiffs. The plaintiffs argued that because the "arbitration fees may exceed the potential recovery,"[73] the arbitration agreement was unconscionable, and therefore unenforceable, under either California, Delaware, or Florida law. Although sympathetic to the argument, which the court said "certainly has appeal," the court held that it had been rejected by *Concepcion*, and compelled arbitration.[74]

A more intriguing question is to what extent *Concepcion*'s impact transcends California. The plaintiffs' Supreme Court brief in *Concepcion* identified twenty other jurisdictions as having adopted rules similar to California's *Discover Bank* rule.[75] One of those was New Jersey. In *Litman v. Cellco Partnership*,[76] a case that like *Concepcion* arose out of a consumer dispute over a cellphone contract (this time an allegedly improper monthly administrative charge of $.40 to $.70), the Third Circuit had held prior to *Concepcion* that an arbitration provision in the cellphone contract was unenforceable under New Jersey law because it waived arbitration. After *Concepcion*, the Supreme Court summarily vacated the Third Circuit's original decision in *Litman* and remanded for reconsideration in light of *Concepcion*. On remand, the Third Circuit said it "understand[s] the holding of *Concepcion*

vv68 *Concepcion,* 131 S. Ct. at 1747-48 (internal quotation marks and alterations omitted).

69 *Id.* at 1746 (internal quotation marks omitted).

70 *Id.* at 1748.

71 *Id.* at 1753.

72 2011 WL 4712204 (N.D. Cal. Oct. 7, 2011).

73 *Id.* at *10.

74 *Id.*

75 Brief for Respondents at 1-2, 13, 1a-3a, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (No. 09-893).

76 655 F.3d 225 (3d Cir. 2011), *cert. denied,* 132 S.Ct. 1046 (2012).

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to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA . . . ."[77] Therefore, the court held that the New Jersey rule was preempted and enforced the arbitration provision.[78]

Other courts, however, have been finding ways around *Concepcion*. The most prominent example yet is the Second Circuit's decision in February in *In re American Express Merchants' Litigation*.[79] In that case, a putative class of merchants sued American Express under the antitrust laws for allegedly leveraging its market power in charge cards to force merchants to accept other types of American Express-branded cards. The decision in February was the Second Circuit's third opinion in the same appeal. In the earlier decisions, a Second Circuit panel that originally included then-Judge Sonia Sotomayor (since elevated to the Supreme Court, and signatory to a vigorous dissent by Justice Breyer in *Concepcion*), held that a class arbitration waiver in the merchants' agreements with American Express was unenforceable.[80] Following *Concepcion*, the court entertained supplemental briefing and reconsidered its earlier decisions. The Second Circuit ultimately held, however, that "*Concepcion* does not alter our analysis."[81] The court adhered to its prior decisions holding American Express's class arbitration waiver unenforceable because "the practical effect of enforcement would be to preclude [the merchants'] ability to vindicate their federal statutory rights," a question that it stressed was left open by *Concepcion*.[82]

Likewise, the Missouri Supreme Court in *Brewer v. Missouri Title Loans*,[83] held that even after *Concepcion*, arbitration agreements with class action waivers can be rendered unenforceable by more general concepts of unconscionability. That case involved an automobile title loan agreement that required the loan recipient to resolve any claim against the title company in bilateral arbitration. In a pre-*Concepcion* decision, the Missouri Supreme Court had held the class arbitration waiver to be unconscionable, but after *Concepcion*, the U.S. Supreme Court vacated that decision and remanded the case for reconsideration in light of *Concepcion*.[84]

In its latest decision in *Brewer,* the Missouri Supreme Court concluded that *Concepcion* did not find "all state law unconscionability defenses [to be] preempted by the federal act in all cases," but instead "recognizes that a case-by-case approach provides the appropriate analytical framework for assessing the applicability of state law contract defenses …"[85] The court thus conducted a case-by-case approach to determine whether the arbitration agreement "as a whole" was unconscionable, and found it to be unconscionable because, among other reasons, the agreement was difficult for the average consumer to understand, the company was in a superior bargaining position, the agreement was extremely one-sided, a consumer would have difficulty retaining counsel, and the company was allowed to pursue processes other than arbitration, such as self-help repossession.[86] Therefore, based on state law contract defenses, the Court found the entire arbitration agreement unconscionable and unenforceable.

Similar analyses have begun to catch on back in California, home territory for the *Discover Bank* rule that *Concepcion* demolished. In another automobile-related case, *Sanchez v. Valencia Holding Company*,[87] car purchasers filed a state-court class action against a car dealership for allegedly making false representations. The dealership moved to compel bilateral arbitration based on its contract with the plaintiff. The California Court of Appeal found the entire arbitration agreement to be unconscionable because it was adhesive and contained one-sided terms in favor of the dealership. The court explained that it was "not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the Federal Arbitration Act," and hence *Concepcion* was inapposite.[88] Rather, the Court relied on general unconscionability principles that "govern all contracts, are not unique to arbitration agreements, and do not disfavor arbitration."[89]

These cases demonstrate that although *Concepcion* blocked one particular route by which class action plaintiffs had successfully

77 *Id.* at 231.

78 *See also Quillion v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221 (3rd Cir. 2012) (finding a similar rule created under Pennsylvania case law to be preempted by the FAA); *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (finding a similar rule created under Washington case law to be preempted by the FAA).

79 667 F.3d 204 (2d Cir. 2012).

80 *In re Am. Express Merchants' Litig.*, 634 F.3d 187 (2d Cir. 2011); *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009).

81 *In re Am. Express Merchants' Litig.*, 667 F.3d at 206.

82 *Id.* at 212. The court reasoned that the cost to pursue an antitrust claim against American Express would be at least a few hundred thousand dollars, while the most that any plaintiff individually would be able to recover was less than $40,000.

83 2012 WL 716878, –– S.W. 3d –– (Mo. Mar. 6, 2012).

84 *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 19 (Mo. 2010), *granted, vacated, and remanded,* 131 S. Ct. 2875 (2011).

85 *Brewer,* 2012 WL 716878 at *4-*5.

86 *Id.* at *7.

87 *Sanchez v. Valencia Holding Co., LLC,* 135 Cal. Rptr. 3d 19 (Cal. Ct. App. 2011), *review granted,* 272 P.3d 976 (Cal. 2012).

88 *Id.* at 29.

89 *Id.* (emphasis in original).

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avoided bilateral arbitration, many other routes remain. For example, plaintiffs may still be able to bypass bilateral arbitration if a court finds that arbitration would hamper the vindication of federal statutory rights, or if an arbitration clause is unconscionable for reasons independent of the class-action waiver. Reports of the death of the consumer class action in the days immediately following *Concepcion* were, it now seems, greatly exaggerated. In *Concepcion*, the Court observed that the Federal Arbitration Act, passed in 1925, was originally motivated by "judicial hostility towards arbitration that … had manifested itself in a great variety of devices and formulas declaring arbitration against public policy."[90] Nearly a century later, what the aftermath of *Concepcion* may prove more than anything else is that both "judicial hostility towards arbitration" and the quest for new "devices and formulas" to get around it are as alive as ever.

While *Wal-Mart* and *Concepcion* were clearly important landmark decisions, class actions have proven to be an exceptionally hardy breed. Perhaps in time, as the lessons embodied in these decisions saturate the judicial consciousness, we will see a discernable trend toward fewer certifications of antitrust and consumer protection classes. But for now, the record in antitrust and consumer protection cases as it stands one year out evokes the old adage that the more things change, the more they stay the same. ■

90 *Concepcion,* 131 S. Ct. at 1747 (internal quotation marks omitted).

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Following Wal-Mart v. Dukes, *District Court in Ninth Circuit Requires "Rigorous Analysis" in Antitrust Class Certification Decision*

by Wesley R. Powell and G. Shireen Hilal, *Willkie Farr & Gallagher*[1]

Introduction

In *Wal-Mart Stores, Inc. v. Dukes*,[2] the Supreme Court held that the largest employment discrimination case in U.S. history – which alleged that Wal-Mart had discriminated against 1.5 million current and former female employees with respect to pay and promotion – was improperly certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.[3] Most observers predicted the decision would significantly impact employment discrimination litigation. Whether *Dukes* would affect class certification in other contexts, including antitrust, was less certain.[4] A recent federal district court decision from the Central District of California – *In re Live Concert Antitrust Litigation* – shows that *Dukes* has already influenced class analysis in antitrust cases.

Wal-Mart Stores v. Dukes: *The Supreme Court's Decision*

The Supreme Court found the lower courts' class treatment of the claims against Wal-Mart contrary to Rule 23 in two respects. First, the Court found plaintiffs had proffered insufficient evidence to demonstrate that a common question – whether all class members had been injured by a "general policy of discrimination" – linked all 1.5 million members of the putative class, as required by Rule 23(a).[5] Second, the Court found the district court improperly aggregated plaintiffs' back-pay claims pursuant to Rule 23(b)(2), which permits a court to certify only injunctive relief claims, and should have evaluated those claims instead under Rule 23(b)(3), which governs certification of monetary relief claims.[6]

Dukes's Applicability to Antitrust

In most putative antitrust class actions, certification decisions turn on the predominance inquiry of Rule 23(b)(3), not Rule 23(a), which was at issue in *Dukes.* Courts typically assess whether, at trial, class members will seek to prove they were injured by defendants' conduct using evidence that is predominantly common to all class members or, instead, specific to individual class members. Apart from concluding that the back-pay claims in *Dukes* should have been analyzed under Rule 23(b)(3), the Court did not rule on the scope of the Rule 23(b)(3) inquiry.

The Supreme Court, however, did address whether a trial court must look beyond the pleadings and analyze the case record to determine whether class representatives can establish all elements of Rule 23.[7] Until early last decade, many courts – relying on the statement in *Eisen v. Carlisle & Jacqueline* that a court should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action" – declined to look beyond the pleadings.[8] More recently, numerous courts of appeals have concluded that approach had been based on a misreading of *Eisen*. Those courts have invoked the Supreme Court's decision in *General Telephone Co. of Southwest v. Falcon* instead, holding that courts must subject certification motions to "rigorous analysis" and that class representatives must present evidence sufficient to establish each element of Rule 23.[9] Prior to *Dukes*, the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits had adopted varying formulations of the "rigorous analysis" standard.[10] The D.C. Circuit adhered to the lower *Eisen* standard,[11] and the Ninth Circuit had not adopted a consistent position, at least until *Dukes*.[12]

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2 131 S. Ct. 2541 (2011).

3 *Id.* at 2547.

4 *See* Ellen Meriwether, *The "Hazards" Of Dukes: Antitrust Class Action Plaintiffs Need Not Fear The Supreme Court's Decision*, 26 ANTITRUST 18 (Fall 2011).

5 *Dukes,* 131 S. Ct. at 2545.

6 *Id.* at 2565-66

7 *Id.* at 2551.

8 417 U.S. 156, 157-58 (1974).

9 457 U.S. 147, 161 (1982).

10 *See, e.g., Gintis v. Bouchard Transp. Co., Inc.*, 596 F.3d 64 (1st Cir. 2010); *In re Initial Pub. Offering Sec. Litig.*,483 F.3d 70 (2d Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009); *Gariety v. Grant Thornton, LLP,* 368 F.3d 356 (4th Cir. 2004); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307 (5th Cir. 2005); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); *Vallario v. Vandehey,* 554 F.3d 1259 (10th Cir. 2009); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009). Following *Dukes*, the Sixth Circuit recently adopted the "rigorous analysis" test. *Gooch v. Life Investors Ins. Co. of Am.*, 2012 WL 410926, at *8 (6th Cir. 2012).

11 *See, e.g., In re Nifedipine Antitrust Litig.*, No. 08-8014, 2009 U.S. App. LEXIS 3643 (D.C. Cir. Feb. 23 2009); *In re Rand Corp.*, No. 02-8007, 2002 U.S. App. LEXIS 13683 (D.C. Cir. July 8, 2002).

12 *See, e.g., Blackie v. Barrack,* 524 F.2d 981 (9th Cir. 1975); *Moore v. Hughes Helicopters, Inc.* 708 F.2d 475, 480 (9th Cir. 1983); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005). In the *en banc* decision reversed by the Supreme Court in *Dukes*, the Ninth Circuit sought to make clear that it too followed *Falcon*'s "rigorous analysis" standard for certification, notwithstanding any ambiguity in the Circuit's prior decisions or contrary decisions by district courts within the Circuit. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). Following the Supreme Court's decision in *Dukes*, a Ninth Circuit panel cited *Dukes* for the proposition that "rigorous analysis" applies to class certification decisions, in the context of an employment dispute. *See Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 980 (9th Cir. 2011).

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Dukes confirmed that courts must apply a more stringent standard to class certification motions: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."[13] Moreover, citing *Falcon*, the Supreme Court recognized that courts must apply a "rigorous analysis" to plaintiff's evidentiary showing, even if it "entail[s] some overlap with the merits of the plaintiff's underlying claim."[14] The Court also "doubt[ed]" that a motion to exclude unreliable expert testimony was improper at the class certification stage but did not need to decide that issue, as plaintiff's expert testimony, even if considered, was not sufficient to support certification. [15]

The Court's observations about the "rigorous analysis" standard has now been followed by a district court in a high-profile antitrust litigation within the Ninth Circuit.

In re Live Concert Antitrust Litigation

On March 23, 2012, the U.S. District Court for the Central District of California issued a long-awaited decision on a collection of motions in *In re Live Concert Antitrust Litigation,* including defendants' motions for summary judgment and to decertify the class.[16] This consolidated action is the latest chapter in the decade-old litigation alleging that Clear Channel engaged in anticompetitive conduct in the promotion of live music concerts.

The story began when a putative class action was filed in 2002 in the Southern District of New York, alleging that Clear Channel violated Section 2 of the Sherman Act.[17] Plaintiffs claimed that Clear Channel abused its position as the nation's largest concert promoter to set nationally uniform concert ticket prices for certain tours, which allegedly resulted in inflated prices for concert tickets.[18] After a three-day hearing that included testimony from both sides' experts, the district court denied plaintiffs' motion for certification of a nationwide class of concert ticket purchasers on the grounds that the relevant market was local, not national; accordingly, the class could not satisfy Rule 23(b)(3) "because particular proof – specific to individual members of the putative class who reside in different geographic markets – would predominate."[19] The Second Circuit affirmed and plaintiffs voluntarily dismissed the action.[20]

A group of plaintiffs subsequently filed twenty-two putative class actions against Clear Channel, alleging claims substantively identical to those in the prior litigation in the Southern District of New York, but claiming the existence of regional relevant markets. These actions ultimately were consolidated and assigned to the Central District of California, which certified five classes in 2007 related to five geographic markets: Los Angeles, Chicago, New Jersey/New York, Boston, and Denver.[21] The district court applied then-governing Ninth Circuit precedent, *Dukes v. Wal–Mart, Inc.*, 474 F.3d 1214, 1229 (9th Cir. 2007),[22] which precluded the court from "resolving factual disputes – and, in particular, weighing conflicting expert testimony – at the class certification stage."[23] The court was essentially required, for purposes of class certification, to "accept as true the representations of plaintiffs' expert."[24]

In its March 23 decision, the district court revisited its 2007 class certification decision in light of the Supreme Court's decision in *Dukes*. The district court found that *Dukes* had announced a "significantly different standard" for reviewing a class certification motion than the standard that governed its 2007 decision – *i.e.*, "rigorous analysis" of the factual record, even if that analysis overlaps with underlying case merits.[25] Thus, the court's prior certification order "was based on a legal standard that is no longer in effect, which precluded the court from undertaking a meaningful analysis of either the underlying facts of the case or the representations of the parties' respective experts. As such, that order has little to no precedential value at this point in the litigation."[26]

13 *Dukes,* 131 S. Ct. at 2551.

14 *Id.*

15 *Id.* at 2554.

16 *In re Live Concert Antitrust Litig.,* No. 06-ml-01745, 2012 WL 1021081 (C.D. Cal. March 23, 2012).

17 *Heerwagen v. Clear Channel Commc'ns, Inc.*, 435 F.3d 219, 223 (2d Cir. 2006).

18 *Id.*

19 *Id.* at 229.

20 *Id.* at 235.

21 *In re Live Concert Antitrust Litig.*, 2012 WL 1021081, at *1.

22 The original Ninth Circuit decision in *Dukes* was subsequently withdrawn and replaced by *Dukes v. Wal–Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), which was, in turn, reversed by the Supreme Court in *Wal–Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011).

23 *In re Live Concert Antitrust Litig.*, 2012 WL 1021081, at *2. The court cited only *Dukes* as authority for this "significantly different" standard, although, as noted above, a Ninth Circuit panel applied the "rigorous analysis" test in the employment context following *Dukes* in *Ellis*. 657 F.3d at 980.

24 *In re Live Concert Antitrust Litig.*, 2012 WL 1021081, at *2.

25 *In re Live Concert Antitrust Litig.*, 2012 WL 1021081, at *2.

26 *Id.*

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Applying the new *Dukes* standard, the court evaluated whether plaintiffs' expert's damages analyses took "into account non-conspiratorial factors that would have caused prices to be different in the conspiracy period even if there had been no conspiracy."[27] Plaintiffs' expert had performed several statistical analyses (including a "yardstick" approach, a "before-and-after" comparison, and a "pooled sample" analysis).[28] The court determined that these analyses were flawed and inadmissible. The "yardstick" approach assumed with no explanation that differences in ticket prices were due entirely to defendants' conduct, failing to account for factors such as artist popularity.[29] Plaintiffs' "before-and-after" approach was similarly flawed, in that it ignored the dramatic increase in ticket prices in the year before defendants entered the market.[30] Plaintiffs' "pooled sample" analysis – which combined data on all concerts over several years to determine that a "structural break" occurred when defendants entered the market – not only failed to account for factors other than defendants' entry into the market, but also did not analyze whether a break occurred in any other year.[31]

Finally, the court concluded that plaintiffs' expert's analysis of the relevant market was inadmissible for two reasons.[32] First, the expert failed to satisfy Rule 702's requirements in formulating the definition of the relevant product market (live rock music concerts). The expert utilized the widely-accepted "Small but Significant and Non-transitory Increase in Price" (SSNIP) methodology, but started and ended his market analysis with live rock music concerts, without considering any narrower or wider market definition.[33] The expert also defined the relevant product market on the basis of demand considerations alone, rather than considering cross-elasticity of supply.[34] Second, the expert failed to use a reliable methodology to populate his proposed relevant market as defined – *i.e.*, how to determine which performers are rock artists and therefore which perform in rock concerts.[35]

In light of these deficiencies, the court held that plaintiffs were unable to establish proof of a relevant market – an essential element of Section 2 cases. Accordingly, the court granted defendants' motion for summary judgment as to plaintiffs' claims of monopolization and attempted monopolization, and dismissed as moot defendants' motion for decertification.[36]

Conclusion

The recent decision in *Live Concert Antitrust Litigation* suggests that *Dukes*'s express adoption of the "rigorous analysis" standard in the employment context will lead to closer scrutiny of expert testimony and opinions in class certification motions in antitrust cases. ■

[27] *Id.* at *6.
[28] *Id. at *4.*
[29] *Id.* at *7.
[30] *Id.* at *12
[31] *Id.* at *14.
[32] *Id.* at *25
[33] *Id.* at 18-19
[33] *Id.* at 24.
[35] *Id.* at 17.
[36] *Id.* at *2. The parties are currently awaiting court approval of settlement on remaining claims.

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Market Definition Does Not Yield Evidence of Class-Wide Impact

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Market definition is a first step in many antitrust and merger cases. It is used as a screen to assess the potential for market power of firms at the center of an antitrust inquiry or a merger review. If a dominant share is found or market concentration is high, there may be potential for consumer harm and further review is warranted. If not, market power is less likely and the potential for consumer harm is low.

Market definition is only a form of indirect evidence to assess the potential for market power, or used as circumstantial evidence when direct measures are not possible.[1] The exercise lacks fine precision and opposing parties can often disagree, substantially, on the appropriate definition. In spite of these concerns, its use is nearly ubiquitous and discussed at all stages of antitrust matters, including at the earliest point of litigation – the class certification stage.

Defining markets so early in the process can be useful if the purpose is to screen for potential market power and weed out cases unlikely to succeed on merits, thereby avoiding costly litigation. In practice, however, there have been cases where market definition has been used more broadly as a type of evidence for which it is not well suited.

Leitzinger and Lamb (2007) argue that market definition can be used at the class certification stage, not as an early market power screen, but rather as sufficient proof that the predominance issue has been met in regards to proof of harm.[2] Analyzing actual prices paid by individual class members is not necessary, they argue. Instead, they claim that once the relevant product and geographic markets are defined and market shares calculated, if the firms in question have large market shares, then, as a matter of theory, firms should have market power and would be able to raise prices. Specifically, and problematically, they then assume firms would necessarily raise prices on *each* and *every* customer. Hence, *all* customers who purchased the products in question in the relevant market are properly part of the class.

This is not an appropriate application of market definition. Market definition cannot provide evidence of common, class-wide impact.

There are two general reasons for this. First, the market definition exercise lacks the precision necessary to address impact on the customer by customer level necessary at the class certification stage. A complaint typically defines the set of class members as all those that purchased the product between two points in time. The proposed class is thus broad and in many cases unlikely to fall in a single relevant market. It is unlikely each member will have a very similar set of alternate supply options, and many may have purchased items where defendants hold no market power at all. In our experience there is a tendency for an expert in support of class certification to build the market definition around the class members' purchases and include the entire class as a minimum, even when that is not appropriate. In reality, class members can and often do differ substantially from one another and the investigation into these differences remains paramount.

The second issue is that the market definition method does not actually show impact at all, not to any particular customer, let alone to the class in common. The method assumes harm since the class buys product from the defendants and defendants are assumed to hold market power over that product. But in a true market definition exercise exceptions abound, for example, large buyers may hold buyer power and their continued purchases during the alleged conspiracy period may not be at an inflated price at all. Only an individualized analysis, focusing on actual prices paid against the 'but for', would reveal whether individual customers were in fact impacted.

Market Definition Is Not a Proper Tool for Accessing Common Impact

The Mismatch Between Class Members in the Complaint and the Actual Defined Market

According to the Merger Guidelines, the relevant market is the

1 "The Role of Market Power in Statutory Antitrust Offenses." *Market Power Handbook: Competition Law and Economic Foundations.*, ABA Section of Antitrust Law, pp. 19-20 (2d ed. 2012).

2 Leitzinger & Lamb write, "We believe that relevant market analysis – along with its accepted analytical framework, modes of proof, and standards for evidence – may be the answer. In particular, there is compelling economic logic to suggest that proof of the relevant market (combined with a showing proposed class members were participants within that market) should be sufficient to meet the predominance requirement as to proof of injury." Jeffrey Leitzinger & Russell L. Lamb, "The Predominance Requirement for Antitrust Class Actions – Can Relevant Market Analysis Help?" Economics Committee Newsletter, ABA Section of Antitrust Law, Volume 7, Number 1 (Spring 2007).

3 Horizontal Merger Guidelines, § 4.1. U.S. Department of Justice and the Federal Trade Commission, issued August 19, 2010.

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smallest set of products and geographical region, surrounding the product(s) in question, for which a hypothetical monopolist of all products in that set and region could raise prices by a small but significant and non-transitory amount over current levels.[3] The relevant market also can be restricted to certain buyer types or channels of distribution, so, for example, the same *physical* product can be in or out of the *relevant* market depending on who buys it or how it is sold.[4]

Even with this guidance, market definition is by its nature an imprecise exercise, an issue that is exacerbated when used at the class certification stage to identity common impact. The hypothetical monopolist test laid out in the Guidelines, after all, is based on a hypothetical. As a result, empirical estimation sometimes gives way to qualitative arguments about which products or areas should be "in" or which should be "out". Opposing parties can disagree, significantly, as to the proper market definition, and these broad-brushstroke "in" and "out" decisions can have a substantial impact on the size of the relevant market, and implications for market power.

The imprecision is magnified when used in a class setting to establish common impact. Class definitions often proposed by plaintiffs in the complaint are defined as all entities that purchased the physical products in question from the defendants between two dates. For example, in a recent case involving the cement industry, the class was defined as "All Persons who purchased Ready-Mixed Concrete directly from a facility within the Central Indiana Area, at any time during the Class Period."[5] The expert will often take the class as given in the complaint, and use it as the starting point for a relevant market defined as the set of products purchased by class members in the named geographical areas. After concluding that all purchases are in the relevant market, the analysis would then seek to show whether defendants' held market power in that market. If so, the expert might conclude that all customers were harmed in common.

But one of the key purposes of the class certification inquiry is to determine whether all entities in the proposed class were impacted, not that the "average" class member was impacted. It may be some customers in the class may have purchased items where the defendants do not hold market power, because they are in an area, for example, where supply alternatives are many.[6] Or, perhaps a large customer has buyer power and can negotiate away any attempted increase in price. More subtly, it may be that in a particular area, supply alternatives are many for some customers, but not for other customers. It may be tempting to simply argue that these customers would not be included in the relevant market if market definition were properly conducted. But as a practical matter it is difficult, if not impossible, to determine if a particular customer, or set of customers, is precisely "in" or "out" of a product market for the purpose of assessing whether they were affected by an alleged anticompetitive arrangement. The only precise means for such a determination is through analysis of actual price effects. Leitzinger and Lamb point out that customers for whom the firms in question would not be able to raise prices should be excluded from the market definition in the first place. Indeed, the Guidelines allow for market definition to be restricted to specific groups of customers when price discrimination is possible and some customers would not face market power concerns. Leitzinger and Lamb should therefore conclude that groups of customers and individual customers who are not impacted should be removed from the proposed market, and from the proposed class.

However, in our experience, this type of analysis, down to specific customers – that takes into account the specific circumstances and supply options for each customer and would potentially reduce the class down from that defined in the complaint – is seldom undertaken in the class definition stage. This is the difficult but critical part of the inquiry. As a result, the market definition method for finding impact tends to become an all or nothing affair. The class, as defined, is all impacted (if aggregate market shares are high), or there is no evidence any are impacted (if they are not).

There is also the risk of a circular argument with the Leitzinger and Lamb approach. Impact is never actually shown. Using qualitative arguments, it may be argued – or sometimes assumed – that most or all customers in the class are similar in their options and their purchases are best considered "in" the relevant market. Then, once the market is defined, and given a showing of high market shares, market power is assumed to follow and it is concluded that all customers "in" the market are impacted. This is circular. The conclusion that all customers were impacted depends closely on the original assumption that all customers were in the same market (and hence impacted). Without actually looking for impact for each customer directly through prices, it is difficult to know in reality which individual customers experienced a price increase and which did not.

4 The term 'physical' is used here to describe an actual product or service, for example ice cream or legal services. The same physical product may be in different product markets based on buyer types or sales channels. For example, ice cream sold at retail outlets may be in a different market than ice cream sold to supermarkets.

5 *In Re Ready-Mixed Concrete Antitrust Litigation,* No. 1:05-cv-00979-SEB-VSS, Second Amended Consolidated Class Action Complaint ¶ 37 (March 9, 2007).

6 For example, imagine a hypothetical customer in the Ready-Mix class described above that resided in a location hundreds of miles from the Central Indiana area, where alternative suppliers were plentiful. Assume further that the customer received a price concession from the facility in the Central Indiana area, thereby explaining the decision to not shift to a nearby supplier. A market definition exercise that concluded that all purchases from that area as in the relevant market, would fail to identify the unique situation facing that customer.

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The concern is the mismatch between how the class is initially defined (purchases of the *physical* product from defendants) and the way that market definition and market shares are calculated (based on the *relevant* product market). If an expert defines a *relevant* market for the purpose of satisfying the predominance issue, there is a temptation to describe the market as containing all of the purchases covered by the initial complaint – accepting that all of the buyers of the *physical* product are of the same region, buyer type, and distribution channel, that they hold the same set of alternative supply options, and that they have similar negotiating power.

Consider an example. In *FTC v. Cardinal Health and Bergin Brunswig* and *FTC v. McKesson Corp and Amerisource Health Corp,* where the FTC moved to block the two proposed mergers, considerable attention was given to market definition.[7] Despite approximately 40 drug wholesalers, the combining parties were by far the largest national wholesalers. Additionally, besides wholesalers, a significant amount of drugs was found to be sold directly by manufacturers predominantly to large drug store chains.

Now imagine the same situation, but instead of the parties merging, there were allegations that the four firms had engaged in a market allocation scheme. A private class action complaint likely would read something like "all buyers of wholesale drugs and related services from defendants during the period." If the plaintiff's expert followed the market definition for predominance approach, the expert would likely be able to make good arguments that the firms competed with one another. Documents, data, and testimony, would all likely indicate that the four national firms viewed themselves as direct competitors, while potentially downplaying smaller regional players as a less significant threat. From this, the expert might therefore conclude that the four national wholesalers constitute a relevant market, and that direct supply, or regional suppliers would not be sufficient to defeat a price increase by a monopoly of national wholesalers. The market shares would be high, market power would be assumed to follow, and this would be used to support a finding of common impact among the class.

Such a conclusion would be not only premature but incorrect, as not all buyers would be harmed. While the court's ruling found that the four national wholesalers did compete in the same market and held a combined 77 percent share, this would not correspond to potential market power over all buyers. For example, the court noted that there were varying levels of regional competition and that "the eastern part of the United States will likely remain more competitive than the western half of the United States."[8] Additionally, the court stated regarding the relevant product market that "different classes of customers have varied ability to substitute the services currently provided by wholesalers" and that a "certain, yet significant, portion of the large retail chains can themselves reasonably provide a substitute for Defendants' services."[9] This implies that while the wholesalers might hold market power in many locations and for some customers, this is far below a standard of showing that *all* customers would be harmed in common.

The market definition exercise is best suited for identifying competing products in a relevant area, and then finding those firms that supply the product in that area. Indeed, it is routinely the case that when considering a merger between two firms, multiple potential markets may be considered, encompassing portions of the merging firms' customers. Even after the overlapping markets are found, factors such as buyer power, or self-supply may be considered as a means which would prevent the exercise of market power. It is simply unlikely that a set of customers, as is identified at the complaint stage, will all be subject to the same set of channels of supply, have the same set of supply options, and have the same level of bargaining power.

The Hypothetical Monopolist Test

The fact that market definition often is conducted with only average prices and aggregate volume shifts – that is, without any customer specific information – highlights its lack of precision for the purpose of evaluating customer impact. Even when customer specific information is available, under the SSNIP test, the information is typically aggregated to the product and geographic level (using product-specific market shares and product-specific averages prices) when the analysis begins.

The use of aggregates hides the individual variation that may be inherent in customer pricing and volume movements. Take the standard SSNIP test with a threshold of 5%. The question for market definition is whether a price increase of 5% would result in sufficient volume loss to render the price increase unprofitable. It can be seen immediately that key individual issues have been

7 Federal Trade Commission v. Cardinal Health, Inc. and Bergen Brunswig Corp, Civil Action No. 98-595 (D.D.C. 1998); Federal Trade Commission v. McKesson Corp. and Amerisource Health Corp., Civil Action No. 98-596 (D.D.C. 1998).

8 *Ibid.*

9 *Ibid.*

10 Under critical loss analysis, the lower the profit margin the more volume the firm will tradeoff for a price increase. To see this consider an extreme example where a firm has sales of $100 million, but profits are 0. Technically, the firm would be willing to sacrifice virtually all their sales for price increase, provided the remaining sales earn a profit level greater than 0.

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ignored, for example, is the 5% price increase an average, or an across the board increase? Could it be 10% on some products and 0% on others? Could it be 10% on products sold to some customers but 0% on those sold to others?

Then consider 'volume loss.' Assume that the volume loss is small enough that the price increase is profitable. This may be fine for merger review, but those customers that could switch and avoid injury are crucial to the class certification inquiry. The 'critical' level of volume loss where the price increase is still profitable can be significant for firms where margins are low.[10] At the class certification stage, these lost customers cannot be ignored as they may represent a significant portion of the class. Additionally, the temptation to conclude "if they purchased during the class period, then by definition they are not part of the defecting volume" should be resisted. This is a flawed argument that simply assumes harm. Instead, it may be the case that in fact there was no increase in market power for those customers because they were not buying products in the relevant market, or perhaps they were able to use buyer power to prevent the price increase. These are the types of individual inquiries that must take place and that negate the use of market definition conclusions for class-wide impact.

Defining Markets in Actual Practice

Further, the process of how markets are actually defined in antitrust raises concerns about using market definition for concluding class-wide impact. In practice, it is often difficult to find high quality transaction data that can be used to measure elasticities for use in the hypothetical monopolist test. As a result, it is not uncommon for practitioners to use several other sources such as customer surveys, feedback from trade publications, and company documents. These sources can be useful for determining a relevant set of competitors from the perspective of customers, the industry, and the combining firms. If the evidence points to firm B as the primary competitor of firm A, this would raise concerns about the potential for some level of market power if the two firms were to merge, and would warrant additional scrutiny, perhaps in the form of a second request. At the end of the process it might be found that the concerns were unfounded in which case the merger would go through, or perhaps a consent decree would allow for remedies, such as the selling of a plant or product line, that would relieve antitrust concerns.

But that type of document-based analysis cannot conclude that all of the customers, even if they buy the same type of products from firm A or B, are potentially impacted in common. The documents would only be a piece of evidence that the two firms may compete, and therefore may have the ability to raise prices on some set of customers. It does not follow that they could raise prices on all customers, as would be implied in a litigation context. The documents are simply not likely to be so detailed as to provide a complete picture of all of the customers that may or may not be affected. In fact, if documents did exist that discussed specific customer relationships, they might reveal that those relationships and pricing arrangements are highly individualized. But, the absence of such documents does not imply uniform treatment.

Market Definition Is Not A Substitute for a Direct Test of Impact

A more relevant measure of customer impact is the difference between actual price paid after the anti-competitive act and an estimate of the but-for price that would have been paid absent the act. Prices actually paid by class members are often easy to observe but can sometimes be complicated when prices are set by individual negotiations. Listed prices or posted prices may or may not reflect the true price class members pay and, importantly, prices may be similar or may differ substantially from one customer to the next. But-for prices for each customer are often estimated, and again may differ across class members. Customer impact is usually given by the difference between the actual and the but-for price, summed across purchases, but in some cases outcomes other than prices may be of interest as well. For example, reductions in customer choice or quality may also cause harm, whereas price increases combined with quality increases may not.

Market definition used to show common impact avoids actual price analysis by making a series of strong assumptions in its place. At the market definition stage, products, geographical areas, distribution channels, and even potentially groups of customers themselves are each categorized "in" or "out", sometimes based on aggregate switching behavior or sometimes on qualitative argument alone. That different customers can experience different sets of supply alternatives and different degrees of competition even in the same place or at the same time highlights that the exercise – which ultimately produces a

[10] Under critical loss analysis, the lower the profit margin the more volume the firm will tradeoff for a price increase. To see this consider an extreme example where a firm has sales of $100 million, but profits are 0. Technically, the firm would be willing to sacrifice virtually all their sales for a price increase, provided the remaining sales earn a profit level greater than 0.

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single set of market shares for the entire market – lacks a meaningful degree of precision for common impact.

Importantly, the expert claiming market power must claim that the exercise of market power applies uniformly across the class and would impact *all* or substantially all class members. This requires a strong assumption, highlighted by the fact it is based on just a few market share calculations and no information on the prices class members actually paid. The problem is that even though class members differ in many ways – even those lumped together in the relevant market – once they are included in the market, all important differences are assumed away. So as long as market shares are high enough to assume market power, it is purely an assumption that no class member can avoid a price increase.

The uniformity assumption is troubling because it assumes away an important question at the class stage – whether customers' individual characteristics and circumstances are similar enough that they would all be impacted in common.

Conclusion

Market definition has been proposed as a means for showing common impact among potential class members. The method would define a relevant market, and given a finding of high concentration, would assume impact for *all* buyers that are in the relevant market. But as discussed above, the process of defining markets is not conducive to a determination of impact. Market definition is an inexact practice, often based on qualitative analysis, that is best used as a means for identifying groups of competitors, and as a preliminary screen for potential market power. By assuming impact to the class on the basis of high market shares and assuming that impact is uniform across all customers in the market, the market definition approach to evaluating impact assumes away the very questions that the class certification exercise is meant to answer. Hence, it should not be used and is no substitute for a showing of actual direct effects. ■