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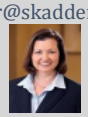

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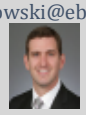

Be an Expert in Working with Economic Experts

By Andrew E. Abere & Michelle A. Cleary *

INTRODUCTION

Expert economic testimony has become increasingly important in antitrust cases. Many of the most crucial issues in antitrust cases hinge on empirical economic evidence, such as levels and trends in prices, market shares, sales, margins, profitability, and shipment patterns.[1] More sophisticated analyses, such as econometric and statistical studies, have increasingly played a larger and more central role in antitrust litigation.[2] For any of these analyses to be useful, they must be based on sound economic principles, statistical techniques and reliable data.[3] Economists play a pivotal role in conducting these analyses and assuring that they are reliable, making an economic expert a critical member of the legal team.

Let's say you've identified the perfect economist to be an expert witness in your antitrust case. She has impressive credentials, relevant experience and expertise, an unblemished record as an expert witness, and best of all, she is interested and has time to work on your case. Working effectively with economic experts, though, goes beyond just knowing and complying with the Federal Rule of Civil Procedure 26, Federal Rule of Evidence 702, or *Daubert*. In this article, we will discuss what in our experience have been ten practical issues that arise when lawyers work with economic experts, especially in the expert report phase, and some guidelines to address them. We cover them in the order they arise over the life cycle of a typical antitrust case in Federal court.

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ISSUES AND GUIDELINES

When should the expert be retained? It is often valuable to engage an expert economist in the early phases of a case. Lawyers, though, are often reticent to do this as they hope to resolve the case through their lawyering skills long before expert testimony is necessary, and do not want to incur unnecessary costs. However, hiring an economist early on in a case does not necessarily mean that the meter will be running from that point on, resulting in a big bill. Indeed, hiring an economist early on may actually help *reduce* costs by allowing the economist to assist in writing a complaint that will survive a motion to dismiss or aiding in determining what types of data and documents both from the party retaining her and the other party (through discovery) might prove useful in an economic analysis. Hiring an economist later in process may reduce costs but could also result in a less effective work product if it also limits the amount of time in which the expert has to conduct her work or if the information she has to consider is limited because discovery is closed.

How should the expert find relevant information in the record? Once the expert and the lawyer have agreed on the scope of the expert's assignment, the expert should be given free rein to conduct her work and be given unfettered access to the record in the case. Given, though, that discovery in antitrust cases can run into the millions of pages (to say nothing of terabytes of data), it is often not feasible for the expert or her staff to comb through the record in search of relevant information. While e-discovery tools can make searching the record easy for an expert or her staff, often a simple keyword search may return thousands of documents that are impractical or even impossible to review before work product is due.

There are two ways to proceed that are both based on the fact that in the vast majority of cases the legal team will have already been through the record and familiar with its contents. These are not mutually exclusive but they do involve tradeoffs. In the first, the expert can identify the types of documents or data she considers would be useful to review, and based on their knowledge of the record these can be selected and provided by the legal team. If the legal team has already created an index of the types of documents and data that have been produced, then this can be provided to the expert and then used by her as a tool to guide the selection of documents or data to review. This approach has the potential to reduce the size of the set of information to review but the tradeoff is that the expert is now relying on the judgment and work product of the members of the legal team that classified the information rather than her own. This may have implications for the credibility of the expert as well as for discovery (*i.e.*, whether the index needs be identified as information the expert considered or relied upon).

The same issue arises not just with documents or data produced in discovery, but also with depositions of fact witnesses. Transcripts in antitrust cases can run into the thousands of pages. If the legal team has already produced summaries, then these can be provided to the expert and then used by her as a tool to guide the selection of transcripts to review. Again, the tradeoff is that the expert is now relying on the judgment and work product of the members of the

legal team that summarized the depositions rather than her own.

In the second approach, the legal team will generally already have identified a relatively small number of key documents in the case that can be provided to the expert and her staff to review. This approach will certainly reduce the size of the set of information to review using the index approach, but the tradeoff is that the expert is now relying even more heavily on the judgment of the members of the legal team that reviewed and identified the documents rather than her own.

It should go without saying that the legal team should not "cherry pick" the record and only provide the expert with "good" information that supports its positions in the case and not "bad" information that does not. Rest assured the expert will be confronted with that "bad" information later on in the case by opposing counsel. Such a surprise will certainly sour the relationship with the expert, and possibly cause her to resign from the case.

How should communications with the expert take place? As in any relationship, good communication between an expert (and her staff) and a lawyer (and the rest of the legal team) is essential. The Federal Rules protect communications between the party's attorney and any witness required to provide a report regardless of the form of the communications, "except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."[4] In some cases, the lawyer and opposing counsel will bargain around the rules and enter into a stipulation as to what is protected and what is not. Whether required by the rules or agreed upon by the parties, the ground rules for communication should be communicated clearly by the lawyer to the expert and her staff when they are retained. The lawyer and the legal team should also consider keeping a log of communications between the expert (and her staff) and a lawyer (and the rest of the legal team) that identifies those that are protected.

Which of the expert's work product is subject to discovery? In addition to communications between the lawyer and the expert, the expert's work product is another area in which there may be concerns about protection. The Federal Rules protect drafts of any report or disclosure required, regardless of the form in which the draft is recorded.[5] As with communications, in some cases the lawyer and opposing counsel will enter into a stipulation as to what is protected and what is not. Whether required by the rules or agreed upon by the parties, the ground rules for work product should be communicated clearly by the lawyer to the expert and her staff when they are retained. The lawyer and the legal team should also consider keeping a log of work product that identifies the product that is protected.

Will the expert rely on the opinion of another expert? Often the expert will need to rely on the opinion of another expert in the case, or *vice versa*. This will require some additional coordination on the part of the lawyer and the legal

team and the various experts and their staffs. The production of the reports will need to be efficiently managed so that one expert will have sufficient time to read the final version of the other's report and incorporate it into the final version of her report.

This situation may also raise concerns about what is protected and what is not. Suppose expert A will need to rely on the opinion of expert B, and A reads a draft of B's expert report. Is the draft of B's expert report protected because it is a draft report or is it not protected because it is something A considered in forming her opinion?

When should the expert's report be produced? The lawyer should ensure the expert and her staff have adequate time to review the record, perform their work, and produce a report before it is due. Absent a stipulation or court order, the Federal Rules require that an expert report be produced at least 90 days before trial, and that a rebuttal report be produced within 30 days of the production of the report to which it responds.[6] In some cases, though, these windows may make production of an effective report impractical or even impossible. For example, in some cases an expert may need to provide a report that rebuts reports from multiple experts. The lawyer should consult with the expert when she is retained to determine if these windows are sufficient, and if not, determine which windows would be sufficient and attempt to obtain a stipulation or court order that includes them.

What must the expert disclose? The Federal Rules require that the expert's report contain "a complete statement of all opinions the witness will express and the basis and reasons for them," and "the facts or data considered by the witness in forming them."[7] What, though, is meant by "considered?" In *Fialkowski v. Perry*, the court held this included "any information furnished to a testifying expert that such an expert generates, reviews, reflects upon, reads, and/ or uses in connection with the formulation of his opinions, even if such information is ultimately rejected."[8] As with communications and work product, in some cases the lawyer and opposing counsel will enter into a stipulation to limit the scope of what must be disclosed to the "facts or data relied upon by the witness."[9] Whether required by the rules or agreed upon by the parties, the ground rules for what must be disclosed should be communicated clearly by the lawyer to the expert and her staff when they are retained. The lawyer and the legal team should also consider keeping a log of information provided to the expert and her staff, which may facilitate the compilation of a list of information considered or relied upon by the expert.

A related issue is which of the "facts and data," whether considered or relied upon, need to be produced. Often these "facts and data" will include information already possessed by all the parties, such as legal filings in the case (*e.g.*, the complaint and the answer), deposition transcripts, interrogatories and responses, and documents produced in discovery. In some cases the lawyer and opposing counsel will enter into a stipulation to limit the scope of what must be produced, as it is inefficient to spend time simply to compile and produce information the parties already possess or can obtain on their own. The latter typically is considered to be information that is "publicly available." What,

though, is meant by "publicly available?" An expert may often consider information that is available to the public, but only at a cost. Sometimes this cost is modest, but at other times it can be significant. For example, market research firms often publish and sell industry research reports to the public at a cost of hundreds or even thousands of dollars. The lawyer and opposing counsel often include in a stipulation a provision that the expert will not need to produce information that is publicly available for free.

Another related issue is in what form the "facts and data," whether considered or relied upon, need to be produced. For example, suppose the expert relied upon a set of data she or her staff downloaded from a government website into a Microsoft Excel spreadsheet. Does the expert need to produce the Excel file or will a PDF suffice? The former will make it easier for the other party to replicate the method and verify the results described in the expert's report. This may be important if there is a small window between the production of the report and the expert's deposition or the deadline for a rebuttal report.

Will the expert be required to produce any unprotected work product, and if so, when? While draft reports and other work product may be protected by rule or by stipulation, it is often the case that some work product is unprotected but not necessarily required to be produced with the report. This work product often includes spreadsheets with calculations, output from statistical software packages, and computer code generated by the expert and her staff that support the opinions expressed in the report. In some cases a party may use a subpoena to obtain this information, typically prior to the expert's deposition. In other cases the lawyer and opposing counsel will enter into a stipulation as to which of this work product is to be produced. In these cases, the ground rules for what must be produced should be communicated clearly by the lawyer to the expert and her staff when they are retained.

An important issue, though, in cases in which the parties have entered into a stipulation is the timing of the production of this work product. In some cases this work product is to be produced simultaneously with the expert's report, and in others this work product is to be produced within three days of the production of the report. The lawyer should ensure the expert and her staff have adequate time to compile the work product and adequate time for the legal team to review the material for any information that might be protected. The ground rules for when work product must be produced should be communicated clearly by the lawyer to the expert and her staff when they are retained.

As with the "facts and data," a related issue is in what form the work product needs to be produced. For example, suppose the expert uses a Microsoft Excel spreadsheet to make some calculations. Does the expert need to produce the Excel file or will a PDF suffice? Again, the former will make it easier for the other party to replicate the method and verify the results described in the expert's report.

When should the expert's deposition take place? The Federal Rules provide that the expert's deposition may be conducted only after the expert's report has been produced.[10] As a result, the window for the expert's deposition

will be between the date of the production of the report and the cutoff date for expert discovery. The lawyer should consult with the expert to determine her preferences regarding to when the deposition should be conducted and determine if they can be accommodated. For example, if a rebuttal report to the expert's report is expected, then the expert may prefer to have her deposition scheduled after production of the rebuttal report so that she may have an opportunity to respond to it in her deposition.

What can the expert change in her deposition transcript? The Federal Rules provide that the expert must be allowed 30 days after being notified that the transcript is available in which to review the transcript or recording, and if there are "changes in form or substance," to sign a statement listing the changes and the reasons for making them.[11] What, however, are "changes in form or substance?" For example, can an expert change her answer from a "no" to a "yes?" Courts are split on the issue. Some take a strict view, permitting only changes to correct transcription errors, while others take a more liberal view, permitting any changes. The ability to make any changes, though, involves a tradeoff. Both versions of the deposition remain on the record, with which the expert may be confronted at trial, and such changes may trigger reopening of the deposition, resulting in the expenditure of more time and money. The lawyer should be familiar with the applicable ground rules and ensure the expert is well aware of them before she makes any changes to her deposition transcript.

CONCLUSION

When one hears the phrase "expert economic testimony" in connection with an antitrust case, the picture that may come to mind is the expert witness on the stand at trial, using exhibits full of charts and graphs to explain economics to the jury. The vast majority of antitrust cases, however, are resolved before trial. Accordingly, there may only be a small chance of the expert witness ever appearing at trial. Yet, the work of the expert, in the form of an expert report or deposition transcript, may be important to the resolution of the case prior to trial by contributing to the granting of a motion to dismiss or a motion for summary judgment, or to settlement. In this article, we have discussed what in our experience have been ten practical issues that arise when lawyers work with economic experts, especially in the expert report phase. Addressing these issues can often not only improve the process, saving time and money, but the quality of the final work product as well.

Courts Continue to Interpret the Meaning of "Rigorous Analysis" of Class Certification Criteria Post-*Comcast*

By Andy Barragry †

In order to obtain class certification, plaintiffs must show that they have satisfied each of the criteria set forth in Federal Rule of Civil Procedure 23(a), and at least one of the subsections of Rule 23(b).[12] In the relatively recent and oft-cited *Comcast Corp. v. Behrend* decision,[13] the Supreme Court emphasized that courts are obligated to perform a "rigorous analysis" of whether the Rule 23 criteria have been satisfied.[14] Given that litigants frequently rely on expert testimony to prove and to challenge certain class certification criteria, this "rigorous analysis" will often require a close examination by the court of the statistical models employed by the parties' respective experts. In the past two years, numerous courts have interpreted the impact of *Comcast*, the "rigorous analysis" standard, and the integrity of expert testimony in class actions, and litigants continue to grapple over class certification requirements.[15]

This article examines two recent opinions involving challenges to class certification in which the respective courts were compelled to closely examine the experts' models as they related to class certification criteria: *Urethane*[16]and *Optical Disk Drive*.[17] These decisions are just two of the more recent significant decisions in an ever-expanding list of cases addressing the impact of *Comcast* on class certification requirements, but they provide a snapshot of the types of issues being litigated. This article concludes with some practical takeaways that can be drawn from these two recent decisions.

I. Tenth Circuit Court of Appeals Upholds Rejection of Post-Trial Challenge to Class Certification Requirements

In a recent decision in *In re Urethane Antitrust Litigation*, the Tenth Circuit Court of Appeals rejected the defendant's challenge to class certification that followed a jury trial and the entry of a damages award totaling more than $1 billion.[18] As one would expect, the initial challenge to class certification came years before trial when the plaintiffs initially moved to certify the class. Over the defendants' challenge, "the district court certified a plaintiff class including all industrial purchasers of polyurethane products during the alleged conspiracy period."[19] Dow, the sole remaining defendant, moved the day before trial to exclude certain expert testimony and decertify the class.[20] The matter proceeded to trial, and, after the jury verdict against Dow, "[t]he district court entered judgment for the plaintiffs, denying Dow's motions for decertification of the class and judgment as a matter of law."[21] Dow renewed its motion to decertify the class "[o]ver a month after the trial ended," relying "for the first time on the Supreme Court's then-recent opinion in *Comcast*."[22] Given the issuance of the *Comcast* decision and the fact that the plaintiffs had the opportunity to respond, the district court entertained the new arguments as to decertification, but

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ultimately "held that *Comcast* did not apply and declined to decertify the class."[23]

On appeal, Dow raised four issues, including two relating directly to class certification. The first issue relating to class certification was Dow's argument "that class certification was improper because common questions did not predominate over individualized questions."[24] On this first certification issue, "Dow maintain[ed] that common questions did not predominate and that the district court's contrary rulings run afoul" of the Supreme Court's decisions in *Wal-Mart* and *Comcast*.[25] The Court of Appeals rejected both of Dow's arguments under *Wal-Mart* – that the district court erred "(1) by denying Dow the right to show in individualized proceedings that certain class members suffered no injury, and (2) by allowing the class to proceed on the basis of extrapolated impact and damages."[26] On the first *Wal-Mart* argument, the Court of Appeals held that individualized proceedings were not necessary, and "the district court acted within its discretion by treating common issues (involving the existence of a conspiracy) as predominant over individualized issues (involving negotiated prices)."[27] On the second *Wal-Mart* argument, Dow attacked plaintiffs' expert's damages model on the basis that it indicated that resolution of the matter would require a prohibited "trial by formula" and that the "models were defective because [plaintiff's expert] did not use representative sampling."[28] The Court of Appeals found that because "Dow waited until the day before trial to seek decertification even though it had received [plaintiff's expert's report] 21 months earlier," the district court "acted reasonably in determining that the motion was late."[29] The Court of Appeals also found that this situation is distinct from *Wal-Mart*, in that "Dow's liability as to each class member was proven through common evidence; extrapolation was used only to approximate damages."[30] As to *Comcast*, Dow argued that plaintiffs' model suffered from the same flaw as did plaintiffs' model in *Comcast* – the failure to prove that damages were attributable to the theory of liability alleged by the plaintiffs.[31] The Court of Appeals, however, found that "*Comcast* does not control because: (1) the decision turned on a concession that is absent here, and (2) we know from the actual trial that individualized issues did not predominate."[32] After addressing the concession that was present in *Comcast* but absent in the present case ("that class certification required a method to prove class-wide damages through a common methodology"), the Court of Appeals proceeded to explain that "because Dow waited until after trial to raise the issue . . . [the] problem [in *Comcast*] was absent here. The district court did not need to predict what would predominate at trial because by the time Dow raised this issue, the trial had already taken place."[33]

The second issue relating to class certification was Dow's argument "that the district court should have excluded the testimony of the plaintiffs' expert witness on statistics" because "the impact and damages models were unreliable . . . [.]"[34] Dow contended that plaintiffs' expert testimony was inadmissible because the expert "manufactured supra-competitive prices through 'variable shopping' and 'benchmark shopping.'"[35] As to Dow's arguments that plaintiffs' expert relied on the incorrect variables, the Court of Appeals addressed in detail the variables at dispute, but concluded that "the district court had the discretion to accept [plaintiffs' expert's] explanation for omitting [certain] variables . . . [and] concluding that Dow's complaints bore on the weight of [the expert's] testimony rather than its admissibility."[36] As to Dow's contention that plaintiffs engaged in

"benchmark shopping" by virtue of its choice as to the time period to set as its benchmark in damages calculations, the Court of Appeals found that the dispute was a "swearing match [resolved] in favor of the plaintiffs" and that it had "no basis to regard this resolution as an abuse of discretion."[37]

II. District Court Rejects Expert Model Following "Rigorous Analysis" in *Optical Disk* Drive

The Northern District of California, in *In re Optical Disk Drive*, recently denied plaintiffs' class certification motions based on defendants' challenge to the methodology for establishing class-wide injury and damages employed by plaintiffs' experts.[38] The plaintiffs, including both the direct purchaser plaintiffs ("DPPs") and the indirect purchaser plaintiffs ("IPPs"), moved for class certification and submitted expert testimony in support of the Rule 23(b) criteria of antitrust injury and damages.[39] The defendants, sellers of optical disc drives ("ODDs"), challenged plaintiffs' certification motion under the requirements of both Rule 23(a) and Rule 23(b).[40] However, as the court noted, the "heart of battle" was defendants' contention that the DPPs' proposed proof that "all (or nearly all) members of the class suffered damage as a result of defendants' alleged anti-competitive conduct" – their expert's testimony – was based on a flawed statistical model.[41] The defendants attacked numerous aspects of plaintiffs' expert's methodology, but most notably argued that the statistical model relied upon by plaintiffs' expert assumed the very fact it was supposed to prove: the existence of class-wide antitrust injury.[42]

In setting forth the legal standard for class certification, the court noted in particular the "rigorous analysis" required by *Comcast*.[43] The court observed that "it is clear that statistical and economic methodologies, including correlation analyses and regression analyses, *may* be employed to establish class-wide impact," but noted that at the class certification stage "the inquiry must be to determine if the proffered expert testimony has the requisite integrity to demonstrate class-wide impact."[44] Applying that rigorous analysis standard to the model at hand, the court found it inadequate, noting that "the alleged conspiratorial overcharge is assumed to be the same for all purchasers across all models of ODDs and throughout the entire class period" and, therefore, "cannot serve to establish that all (or nearly all) members of the class suffered damage as a result of defendants' alleged anti-competitive conduct."[45] The court explained that the plaintiffs' model "calculates that the overcharge was about 11.48 percent in the aggregate, [but] nothing in the regression methodology attempts to show that all or nearly all purchasers were overcharged in that amount, or in any amount at all."[46] The court held that the similar statistical model relied upon by the IPPs' expert was also inadequate, stating: "[the expert's] overcharge coefficients, however, reflect aggregate estimates for all purchasers purchasing ODDs of particular types in given years. As such, class-wide impact is still being *assumed* by the models, rather than demonstrated by the results."[47] Given the flaws identified in the plaintiffs' experts' methodologies, the court found that the Rule 23(b) requirements were not satisfied and denied the plaintiffs' motions for class certification.[48]

III. Takeaways from *Optical Disk Drive* and *Urethane*

The above decisions demonstrate that, in light of the Supreme Court's "rigorous analysis" reminder in *Comcast*, courts have readily accepted the burden of closely scrutinizing class certification requirements, even at the level of analyzing the details of the inputs for the statistical models employed by the experts. As the court in *Optical Disk Drive* notes, it is clear that class certification is not "automatic every time counsel dazzle the courtroom with graphs and tables."[49] While class certification criteria and expert models may be subject to greater scrutiny than in the past, this does not, however, mean that plaintiffs face an impossible task in proving that class certification criteria are satisfied. Plaintiffs would be wise to ensure that their experts' models actually demonstrate the elements of the Rule 23 requirements that they are supposed to prove, rather than merely assuming the existence of that element. Conversely, defendants should be prepared to employ their own experts to challenge the assumptions underlying plaintiffs' experts' models, and should feel confident that plaintiffs' models will be subject to a "rigorous analysis" by the courts.

The decision in *Urethane* suggests, however, that the burden to timely raise, and possibly to renew, the challenge to class certification is on the defendants. Defendants seeking to oppose certification should do so vigorously at the motion for class certification stage, and, if warranted, subsequent motions to decertify should be filed promptly after additional potential grounds for decertification are identified. *Urethane* and *Optical Disk Drive* are just two of the more recent significant decisions in an ever-expanding list of cases addressing the impact of *Comcast*, the rigorous analysis standard, and the integrity of expert testimony in class actions. Practitioners on both sides of the courtroom should keep apprised of developments in the class certification requirements, particularly given the fact-specific nature of analyzing the integrity of expert models and the common difficulties faced by parties seeking class certification in proving the Rule 23 criteria.

Endnotes to "Be an Expert in Working With Economic Experts"

[1] David Scheffman & Mary Coleman, *FTC Perspectives on the Use of Econometric Analyses in Antitrust Cases* (2002), at 1, http://www.ftc.gov/sites/default/files/attachments/economics-best-practices/ftcperspectivesoneconometrics.pdf (accessed 12/11/2014).

[2] Scheffman & Coleman at 2.

[3] Scheffman & Coleman at 12.

[4] Fed R. Civ. P. 26(b)(4)(C). For further discussion of the 2010 amendments to Federal Rule of Civil Procedure 26, *see* Jason J. Rawnsley, *The 2010 Amendments to the Expert Discovery Provisions of Rule 26 of the Federal Rules of Civil Procedure: A Brief Reminder*, ABA SECTION OF LITIGATION 2012 SECTION ANNUAL CONFERENCE (April 18-20, 2012), at 4, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/43-4_2010_amendments_to_rule_26.authcheckdam.pdf (accessed 12/11/2014).

[5] Fed. R. Civ. P. 26(b)(4)(B).

[6] Fed. R. Civ. P. 26(a)(2)(D).

[7] Fed. R. Civ. P. 26(a)(2)(B)(i) and (ii).

[8] *Fialkowski v. Perry*, Civ. Action No. 11-5139, 2012 WL 2527020, at *3 (E.D. Pa. June 29, 2012).

[9] *See Fialkowski v. Perry*, Civ. Action No. 11-5139, 2012 WL 2527020, at *3. The court states that information that must be provided in discovery includes facts or data "considered" and facts or data "relied upon" by the expert. For a discussion of stipulations limiting the scope of discovery on expert materials, *see* Bruce Kaufman, *Evidence – Privileged Communications*, reprinted from The United States Law Week by Bloomberg BNA, at 2, http://www.manatt.com/uploadedFiles/Content/News_and_Events/Firm_News/peluso%20shah_BNA02112014.pdf (accessed 12/12/2014). Kaufman mentions that some courts, such as Delaware, have begun to publish sample expert discovery stipulations. *See Stipulation and Proposed Order Governing Expert Discovery,* COURT OF CHANCERY OF THE STATE OF DELAWARE, http://courts.state.de.us/Chancery/docs/SampleExpertDiscoveryStipulation.pdf at 3 (accessed 12/12/2014) (expressly noting discovery will not be permitted for draft materials and materials only "reviewed or considered" by the expert).

[10] Fed. R. Civ. P. 26(b)(4)(A).

[11] Fed. R. Civ. P. 30(e)(1).

***Endnotes to "Courts Continue to Interpret the Meaning of 'Rigorous Analysis' of Class Certification Criteria Post*-Comcast"**

[12] *See* Fed. R. Civ. P. 23.

[13] 133 S. Ct. 1426 (2013).

[14] *Id.* at 1432 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (internal quotation marks omitted)) ("Repeatedly, we have emphasized that . . . it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. . .[.] The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a).") It has long been the rule that a "rigorous analysis" is required in evaluating whether Rule 23 requirements are satisfied. *Id.*

[15] *See, e.g.*, *In re Polyurethane Foam Antitrust Litig.*, 2014 U.S. Dist. LEXIS 161020 (N.D. Ohio 2014), *perm. app. denied*, No. 14-302, Doc. 60-1 (6th Cir. Sept. 29, 2014), *petition for cert. filed*, No. 14-577 (U.S. Nov. 18, 2014) (challenging Sixth Circuit Court of Appeals decision upholding class certification). *See also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, No. 14-123 (U.S. Dec. 8, 2010); *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014); *In re IKO Roofing Shingle Prod. Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773 (8th Cir. 2013); *In re Photochromic Lens Antitrust Litig.*, MDL Docket No. 2173, 2014 WL 1338605 (M.D. Fla. Apr. 3, 2014); *In re Elec. Books Antitrust Litig.*, Case No. 11 MD 2293 (DLC), 2014 U.S. Dist. LEXIS 42537 (S.D.N.Y. Mar. 28, 2014).

[16] *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. Sept. 29, 2014).

[17] *In re Optical Disk Drive Antitrust Litig.*, Case No. 3:10-md-2143 RS, 2014 U.S. Dist. LEXIS 142678 (N.D. Cal. Oct. 3, 2014).

[18] *Urethane*, 768 F.3d 1245. The jury found that "the plaintiffs suffered damages of $400,049,039. After trebling the damages and deducting the amounts paid by the settling defendants, the court entered judgment against Dow for $1,060,847,117." *Id.* at 1252.

[19] *Id.* at 1249. The defendants contended at the motion for certification stage that "common questions did not predominate over individualized questions." *Id.* at 1251; *see also In re Urethane Antitrust Litig.*, 251 F.R.D. 629 (D. Kan. July 29, 2008).

[20] *Id.* at 1252.

[21] *Id.* at 1249.

[22] *Id.* at 1252.

[23] *Id.* at 1253.

[24] *Id.* at 1249.

[25] *Id.* at 1253 (citing to *Comcast* and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)) .

[26] *Id.* at 1254.

[27] *Id.* at 1255.

[28] *Id.* at 1256.

[29] *Id.*

[30] *Id.* at 1257.

[31] *Id.*

[32] *Id.* at 1258.

[33] *Id.* at 1258-59.

[34] *Id.* at 1249.

[35] *Id.* at 1260.

[36] *Id.* at 1262.

[37] *Id.* at 1263.

[38] *Optical Disk Drive*, 2014 U.S. Dist. LEXIS 142678.

[39] *Id.* at *38, *53.

[40] *Id.* at *42.

[41] *Id.* at *53 (citing *In re DRAM Antitrust Litig.*, No. MO2-1486 PJH, 2006 U.S. Dist. LEXIS 39841, at *41 (N.D. Cal. June 5, 2006)).

[42] *Id.* at *53-59.

[43] *Id.* at *38-40 (citing, *inter alia*, *Wal-Mart* and *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013)); *see also id.* at *55-56 (stating that "[t]he standard under which expert opinion . . . is to be evaluated at class certification has been evolving" and "[c]ertification [should not be] automatic every time counsel dazzle the courtroom with graphs and tables.") (internal quotation marks and quoting citation omitted).

[44] *Id.* at *56-57.

[45] *Id.* at *58; *see also id.* ("[t]he regression analysis . . . assumes the very proposition that the DPPs are now offering it, in part, to show").

[46] *Id.* at *58-59. The court held that the model's similar inability to adequately calculate damages, and the inability to show superiority, served as additional barriers to class certification. *Id.* at *59-63.

[47] *Id.* at *68.

[48] *Id.* at *73.

[49] *Id.* at *55-56.