

Class Actions & Derivative Suits

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In This Issue

- **Class Certification Should Not Be Automatic In Price Fixing Actions**
by Gregory C. Cook and Charlton A. Rugg (page 4)
- **Dismissing Improper Class Actions at the Pleading Stage: The Necessity For Reviewing Courts To Defer To The Discretion Of The Trial Courts**
by Joshua G. Hamilton (page 13)
- **When Does A Class Action “Commence” Under CAFA?**
by Henry Pietrkowski (page 19)

Co-Chair’s Corner

By Rachel S. Fleishman



Tales from the Trenches – The Hall of Fame Decisions Every Young Lawyer Should Know

As I write, New York City is in the midst of a spring bloom. Before you know it, the welcome heat and wilting humidity of a New York City summer will be upon us, along with that other annual staple: the summer associate class. With the thought in mind that this newsletter will be distributed as summer associates arrive in your offices, I decided to use this column to address a problem all summer associates and young lawyers experience at one time or another. It’s that moment when you are in a meeting and, without warning, the more senior lawyers in the room suddenly start speaking in tongues. One minute, you are confidently discussing your painstaking legal research concerning the level of detail necessary to plead a material misstatement or omission with respect to channel-stuffing, or some such, and the next minute everyone around you is talking about something called doo-rah, which, as close as you can figure, is some new kind of motion. You want to ask what a doo-rah motion is, and you know you should ask, but somehow you cannot bring yourself to form the question. A few minutes later, safely back in your office, you ask your officemate if she has ever come across something called a doo-rah motion, and she says she read the Supreme Court’s decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), in her class on securities litigation, but, no, she has not worked on a loss causation motion yet. Oh.

Those moments are going to happen throughout your career. Nobody can be familiar with every case ever decided. Still, we can probably agree that there are some cases every lawyer who litigates class action or derivative suits should know. I asked some well-established lawyers to give me their lists of the handful of decisions every lawyer practicing in these areas should know. Sheldon Raab of

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Fried, Frank, Harris, Shriver & Jacobson and Daniel Halston of Wilmer Cutler Pickering Hale & Dorr were my defense bar experts. My experts from the plaintiffs' bar were my partners, William Fredericks and Douglas Richards, of Milberg Weiss Bershad & Schulman, LLP. In addition, in what can only be described as flagrant overkill, I asked the country's leading expert on civil procedure, Arthur Miller, to contribute his thoughts.

Here, then, without further fanfare, are the first inductees into the Class Action and Derivative Suits Committee's Hall of Fame:

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) – The filing of a class action lawsuit tolls the applicable statute of limitations as to all members of the class. *Id.* at 550. The Court reasoned that “the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiff.” *Id.* at 551. *American Pipe* is the place to start your research in any situation where you have a question concerning whether a class action has tolled an applicable statute of limitations and, if so, for how long.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) – The Court construed Rule 23(c)(2) to require “that individual notice be sent to all class members who can be identified with reasonable effort,” *id.* at 177, in all class actions maintained under subdivision (b)(3). The Court further held that the class representative “must bear the costs of notice to the members of his class.” *Id.* The plaintiffs had argued that publication notice should be permitted, instead of individual notice, because the costs of individual notice were too great for the representative plaintiff to bear. The Court rejected this argument, saying, “individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23.” *Id.* at 176. *Eisen* also touches upon the notion that courts should not delve too deeply into the merits of a case when deciding class certification. *Id.* at 178.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) – Like *Eisen*, *Shutts* is a landmark decision concerning the requirement of notice to class members, but whereas *Eisen* was a statutory construction case, the question presented in *Shutts* had constitutional dimensions. The question for the Court in *Shutts* was whether the Due Process Clause of the Fourteenth Amendment requires absent class action plaintiffs to affirmatively opt in to an action before a court can exercise personal jurisdiction over out-of-state plaintiffs who lack traditional “minimum contacts” with the forum state. The Court held that “a forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though the plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.” *Id.* at 812. With respect to notice, the Court held that plaintiffs “must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.” *Id.* The notice must be the “best practicable” under the circumstances. *Id.*

Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991) – The lone derivative case selected for our Hall of Fame (courtesy of Dan Halston), *Kamen* reversed the adoption by the Seventh Circuit of a “universal demand” rule for all derivative actions. Judge Marshall, writing for a unanimous Court, held that “[b]ecause a futility exception to demand does not impede the regulatory objectives of the [Investment

Company Act of 1940], a court that is entertaining a derivative action under that statute must apply the demand futility exception as it is defined by the law of the State of incorporation.” *Id.* at 108-09.

We welcome the submission of articles on topical issues or decisions involving class actions or derivative suits. If you have any ideas for a future newsletter or an article you wish to submit, please contact Van Bunch, Roger Smith or Jim Rutten at the e-mail or mail addresses shown on the second page of this newsletter. If you are aware of any pertinent decisions and, in particular, any unreported decisions, we would appreciate you bringing them to the attention of Van, Roger, or Jim or any of the contributing editors.

To Our Readers: If you are not a member of the Class Action and Derivative Suits Committee, we encourage you to join. Please visit our website to learn more about the Committee and its activities at www.abanet.org/litigation/committee/classact/home.html.

If you missed an issue of the Class Actions and Derivative Suits Newsletter, you can read it online at www.abanet.org/litigation/committee/classact/home.html. The newsletter is available online to Section and Committee members in Adobe Acrobat format. Log in using your ABA ID# as your user name and your last name as your password.

AmChem Products, Inc. v. Windsor, 521 U.S. 591 (1997) – To my mind, if you are going to read – or re-read – just one Hall of Fame decision, *AmChem* would be the one to read. Among other things, the Supreme Court’s opinion includes a nice overview of Rule 23 that the novice class action practitioner is likely to find a helpful introduction to the area. *AmChem* held that the commonality and predominance tests of Rule 23(b)(3) must be satisfied before a class can be certified, even where the proposed class is a settlement class and there is no intention of trying the case. According to the Court, “it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.” *Id.* at 623. For most class action practitioners, *AmChem* questions will come up and require consideration on a regular basis.

Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627 (2005) – And now we come to *Dura*. Although *Dura* is not a decision construing Rule 23, it appeared on the list of every one of my experts. (Admittedly, every one of my experts has a practice that includes securities litigation.) Still, on the theory that many lawyers who practice in the area of class actions and derivative actions handle securities fraud cases at least some of the time, I’ll cover “doo-rah” quickly. In *Dura*,

the Supreme Court reversed the holding of the Ninth Circuit that an allegation of artificial price inflation, without more, is sufficient to plead loss causation. *Id.*, 125 S. Ct. at 1633-34. Rather, “a plaintiff who has suffered economic loss [must] provide a defendant with some indication of loss and the causal connection that the plaintiff has in mind.” *Id.*, 125 S. Ct. at 1634.

There are undoubtedly other decisions that deserve to be included in a Hall of Fame. For instance, while the focus of this particular sampling of leading decisions has been commercial litigation, as Arthur Miller pointed out, the class action device has been the vehicle for many of the great discrimination and civil rights cases. Even within the broad scope of commercial litigation, we could create separate Hall of Fame lists for different substantive areas, like tort class actions, antitrust class actions, and consumer class actions. Indeed, please feel free to e-mail me with your suggestions for deserving opinions that should be inducted into the CADS Hall of Fame. If I get enough responses to warrant it, we will create a Hall of Fame section for our website, so it can be a permanent resource for young lawyers and lawyers who are new to a practice area. Send your suggestions for Hall of Fame decisions to me at rfleishman@milbergweiss.com. Please put “Hall of Fame Decisions” in the subject line of your email.

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Check Out Our Website's New Look

If you have not visited our website recently, please take a minute to check out our new look at <http://www.abanet.org/litigation/committees/classactions>. We have improved the navigation on the site. In addition, as always, we are constantly adding new case comments and other material we think will be of interest. Be sure to make a particular point of visiting the Calendar section of the website, which provides information and helpful links to upcoming ABA programs.

See you in Hawaii

I look forward to seeing many of you in Hawaii this August for the ABA Annual Meeting. The Annual Meeting is an outstanding place to meet other lawyers, expand your network, and take in some interesting CLE programs, all while enjoying a few days in an island paradise. If your participation in the ABA has not yet included attending events like the Annual Meeting, I urge you to consider taking advantage of these opportunities to meet and network with other ABA members.

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CLASS CERTIFICATION SHOULD NOT BE AUTOMATIC IN PRICE FIXING ACTIONS



By Gregory C. Cook
and
Charlton A. Rugg¹



Several commentators and some courts have indicated that class certification should be virtually automatic or even presumed in antitrust price fixing litigation. *See e.g., In re NASDAQ Market-Maker Antitrust Litig.*, 169 F.R.D. 493, 501 (S.D.N.Y. 1996); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 688 (D. Minn. 1995) (certifying an antitrust case based upon the allegations of the pleadings); *In re Carbon Dioxide Antitrust Litig.*, 149 F.R.D. 229, 232 (M.D. Fla. 1993) (same); *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 525 (M.D. Ala. 1992) (predominance satisfied by the “mere fact of an allegation of conspiracy”); 6 *Newberg on Class Actions* § 18.25 at 83 (4th ed. 2002) (“[A]llegation of a price-fixing conspiracy is sufficient to establish predominance.”). This article argues that they are mistaken and that Rule 23(b)(3) predominance will vary in price fixing cases (and other § 1 cases)

based upon the particular allegations and facts. As shown below, antitrust class certification decisions usually turn on which side has presented evidence that directly supports its class certification arguments rather than merely citing legal principles and case authority.

As is true in any class action, the burden of proof rests squarely on class representatives to satisfy the requirements of Fed. R. Civ. P. 23(a) and one of the types of class actions in Fed. R. Civ. P. 23(b). *See Heaven v. Trust Co. Bank*, 118 F.3d 735, 737 (11th Cir. 1997); 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1759 (2005) (“The party who is invoking Rule 23 has the burden of showing that all of the prerequisites to utilizing the class-action procedure have been satisfied.”). The trial court must employ a “rigorous analysis” in reviewing such proof. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

The courts that hold antitrust allegations alone establish predominance often rely upon language quoted out of context from *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). The vast majority of courts, however, have correctly determined that *Eisen* does not require that courts ignore facts (particularly undisputed facts) of record. *See, e.g., Newton v. Merrill Lynch, Pierce, Fenner and Smith Inc.*, 259 F.3d 154, 168 (3rd Cir.

2001) (long discussion of how *Eisen* can be misused and explaining that the correct rule involves examining the facts of record, and quoting later Supreme Court cases). “Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.” *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)

“It is sometimes taken for granted that the complaint’s allegations are necessarily controlling; but class action machinery is expensive and in our view the court has the power to test disputed premises early on when the class action would be proper on one premise but not another.” *Tardiff v. Knox Co.*, 365 F.3d 1, 4–5 (1st Cir. 2004). Moreover, the 2003 amendments to Fed. R. Civ. P. 23 support this conclusion. The Advisory Committee notes state that “the provision that a class certification ‘may be conditional’ is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”

Instead of assuming predominance simply because price fixing has been alleged, plaintiffs should be required to prove that they can supply common evidence of the (1) existence of a conspiracy, (2) antitrust impact on each class member, and (3) antitrust damages. *See, e.g., Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978).

I. IS THERE COMMON EVIDENCE TO PROVE THE ANTITRUST VIOLATION?

In reviewing the allegations of conspiracy to determine predominance, close attention should be paid to (1) what type of market is involved, (2) whether there are multiple markets or simply one market, (3) the nature of the industry, (4) whether the complaint contains multiple theories of conspiracy, and (5) the number, location, and identity of conspirators. “[C]ourts must perform an individualized analysis of the claims – as well as the industry underlying the claims – before class certification in an antitrust case may be granted.” *In*

re Polypropylene Carpet Antitrust Litig., 178 F.R.D. 603, 617 (N.D. Ga. 1997).

The type of evidence the plaintiffs plan to use at trial to establish the violation should be examined. *See Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (predominance “requires us to consider how a trial on the merits would be conducted if a class were certified”); *Newton*, 259 F.3d at 166-67 (to determine predominance, “consider the substantive elements of the plaintiffs’ case in order to envision the form that a trial on those issues would take”); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000) (“[A] district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.”). “The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.” *Blades*, 400 F.3d at 567. For instance, the plaintiffs normally cannot propose using common evidence of only tacit collusion. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (citing 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 404 (1978)); *see also Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991) (“[I]t is well settled in this circuit that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest.”).

One of the first, and most influential court of appeals cases on price fixing class certifications was *Blue Bird*. There, an antitrust class action was brought by the State of Alabama and certain county school boards against six manufacturers of school buses and seven Alabama distributors for fixing prices through a process of rotating bids. The pre-split Fifth Circuit affirmed the statewide class but reversed the nationwide class. The Fifth Circuit held that the class certification decision “required us to examine closely the school bus industry and to attempt to understand the product, the sellers and the buyers [because] a full understanding of the underlying facts is usually essential if one hopes to

correctly apply the requirements of Fed. R. C. P. 23.” 573 F.2d at 312. The *Blue Bird* court wrote that the Advisory Notes to Rule 23 state “private damage claims by numerous individuals arising out of concerted antitrust violations *may or may not* involve predominating common questions.” *Id.* at 316 (emphasis added). Thus, the “lesson to be learned” is “that there are no hard and fast rules which have developed regarding the suitability of a particular type of antitrust case or class action treatment.” *Id.*; compare *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29 (D.D.C. 2001) (“There are no bright line tests for determining whether common questions predominate.”). “A general rule paints with too broad a brush, and overlooks cases in which class certification may be improper.” *Polypropylene Carpet*, 178 F.R.D. at 616.

BlueBird observed that proving an antitrust violation in that case would involve examining many differing markets, with many participants who were not joined in the litigation (there were over 400 local distributors), operating under many different procedures, and that there were 16,000 purchasing entities nationwide. The defendants provided evidence of the differing ways the various school entities purchased school buses, including some which had detailed statutory procedures and some which had none. The court stated that it was unable to determine from the record “how the plaintiffs intend to establish the conspiracy” and that this must be done “in a manner common to all members of the class.” *Id.* at 321. The court noted that the plaintiffs’ evidence only showed an Alabama conspiracy, and an examination of markets on a state by state basis could not be done with common evidence, particularly because “neither the products involved nor the purchasers appear to be standardized.” *Id.* at 321–22.

The Fifth Circuit recently reaffirmed the holdings of *Blue Bird*, quoting it extensively in *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003). The court, refusing certification in an antitrust case, wrote that “the decision to certify a class may often necessitate a highly factual inquiry.” *Id.* at 297. “The unique facts of each case will generally be the determining factor governing certification.” *Id.* at 301 (quoting *Blue Bird*). “This

in turn entails identifying substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials.” *Id.* at 302.

Some courts have broadly written that if the “alleged violations . . . relate solely to defendants’ conduct, . . . such proof for these issues will not vary among class members.” *Lorazepam*, 202 F.R.D. at 29 (citing *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 694 (D. Minn. 1995)). However, the more precise opinions (for instance, those above) note that even if plaintiffs intend to rely wholly upon defendants’ conduct, the court should still consider the nature of the product and markets and the number of conspiracies alleged. *E.g.*, *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 689 (N.D. Ga. 1991) (“no indication that the plaintiffs plan to proceed hub by hub in an effort to present evidence of many different conspiracies”).

II. IS THERE COMMON EVIDENCE TO PROVE ANTITRUST IMPACT?

Second, plaintiffs must demonstrate that they can use common evidence to prove antitrust impact, one of three essential elements of a Sherman Act case. *See* 2 AREEDA & HOVENKAMP, ANTITRUST LAW, § 331d (2000) (“The fact that some class members may not have been damaged at all generally defeats class certification, because the fact of injury, or ‘impact,’ must be established by common proof.”); *see also Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 143–44 (D.N.J. 2002), *aff’d* 2004 WL 45152 (3d Cir. 2004) (certification denied because expert’s proposed methodologies to show common impact were only “naked conclusions” and expert “offer[ed] nothing else to bolster his conclusions”); *In re Methionine Antitrust Litig.*, 2003 WL 22048232 (N.D. Cal. 2001) (decertifying class after expert could not deliver on claims of common evidence of impact because it did not consider complexity of industry, distribution channels, multiple sellers and hundreds of different products); *Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater New York, Inc.*, 198 F.R.D. 41, 46–47 (E.D.N.Y. 2000); *Polypropylene Carpet*, 178 F.R.D. at 617 (“[I]mpact is a question

unique to each particular plaintiff and . . . must be proven with a fair degree of certainty.”); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 532 (M.D. Fla. 1996); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 382–83 (S.D.N.Y. 1996) (determining that there would be individualized questions of impact and refusing to certify a class with respect to non-list priced products); *Dry Cleaning & Laundry Inst. v. Flom’s Corp.*, 91-CV-76072-DT, 1993 WL 527928, at *4 (E.D. Mich. Oct. 19, 1993) (class certification denied because “[n]o formula proposed would be even-handed among class members or fair to defendants”). “There must under § 4 be proof of ‘injury to business or property’ before a Sherman Act violation becomes cognizable as a private civil remedy.” *Blue Bird*, 573 F.2d at 317. “[A]wareness of the distinction between conduct which violates § 1 of the Sherman Act, and the elements which establish liability in private party litigation or § 4 of the Clayton Act is vital.” *Id.*

“Establishing causation, or ‘fact of damage,’ requires the plaintiff to demonstrate a causal connection between the specific antitrust violation at issue and an injury to the business or property of the antitrust plaintiff. This requirement is in no way lessened by reason of being raised in the context of a class action.” *Bell Atlantic Corp.*, 339 F.3d at 302. Rule 23 “cannot abridge, enlarge or modify any substantive right” and “the court has no power to define differently the substantive rights of individual plaintiffs as compared to class plaintiffs.” *Blue Bird*, 573 F.2d at 318. Therefore, the plaintiff must show that the antitrust violation “was a material cause” of his damage and this conclusion may not be based upon speculation but instead must be proven “with a fair degree of certainty.” *Blue Bird*, 573 F.2d at 317.

Plaintiffs must demonstrate that “every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy.” *Blades*, 400 F.3d at 571 (affirming denial of class certification); *Bell*

Atlantic, 339 F.3d at 302 (“We have repeatedly held that where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.”).

The *Blue Bird* court reached the same conclusion on the impact element as it did on the violation element. The Fifth Circuit noted that the defendants provided very specific evidence, while the plaintiffs offered virtually nothing. The defendants provided evidence that the products were non-standard and the markets were diverse, showing examples of the numbers of different school bus markets, as well as the large number of products (that is, the differences in body and equipment specifications, including differences in windows, engine size, capacity, requirements for handicap accommodation, upholstery, undercoating, fire extinguishers, etc.) See *id.* at 312 n.9.

“[The antitrust impact] requirement is in no way lessened by reason of being raised in the context of a class action.”

The Fourth Circuit appears to adhere to the same standard as the Eighth, Fifth (and Eleventh). In *Windham v. American Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977), growers of tobacco sued tobacco companies alleging antitrust violations. After noting the requirement of “direct injury,” the Court cautioned that class-wide proof of damages in that case “would, in addition, contravene the mandate of the rules enabling act that the rules of civil procedure ‘shall not abridge, enlarge or modify any substantive right.’” *Id.*

There is a startling disconnect between cases such as *Blue Bird*, *Windham*, and *Blades* and the number of decisions that find common evidence of impact. A close examination of these decisions appears to indicate that in some antitrust cases impact becomes “synonymous” with being a buyer because if you are a buyer you have been hurt. This is sometimes true if, based upon the nature of the product and the structure and number of markets involved the wrongful conduct raised all prices nationwide.² *Blades*, 400 F.3d at 571; compare

Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977) (allowing a presumption if “the price structure in the industry is such that nationwide the conspiratorially affected prices . . . [were] higher in all regions than the range which would have existed”); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002) (same); *Cardizem*, 200 F.R.D. at 345 (“the plaintiff showed that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiations, was artificially raised (or slowed in its descent) by the collusive actions of the defendant;” “in virtually all prescription drug transactions the price for the brand is more than the price for the generic”).³

However, this is not true, among other times, where “there are different products and different modes of purchases” – or different, varied markets. *Blue Bird*, 573 F.2d at 324. In other words, “an industry featuring non-uniform products and markets possesses a difficult hurdle because the antitrust impact will have occurred under varied circumstances.” *Polypropylene Carpet*, 178 F.R.D. at 620. The evidence in *Blue Bird* demonstrated that each plaintiff would need to prove that the conspiracy “was actually implemented in his state and that it did, in fact, cause him injury.” *Blue Bird*, 573 F.2d at 327.

A showing of impact requires an assessment of the actual world (where conspiratorial prices are allegedly paid) and the “but-for” world. *See Blades*, 400 F.3d at 569; *Blue Bird*, 573 F.2d at 326 n.36 (concluding that establishing a “but for” baseline was required, but “most difficult, if not impossible, to establish any sort of competitive price because of the variety of bus models and various marketing schemes”). The “but for” world should consider the ancillary impact from changing the alleged wrongful conduct.

Likewise, it would appear that market power would often need to be examined, market by market (and thus, plaintiff’s expert would need to opine, based upon analysis, on the appropriate definition of

a market), to determine whether the defendant actually had the power to alter the market price and thus cause impact. An antitrust plaintiff must demonstrate that common evidence can be used to

demonstrate impact for all putative class members, regardless of their geographic location, regardless of the nature of local markets in which they compete, and regardless of their state laws. *In re Agricultural Chems. Antitrust Litig.*,

1995 U.S. Dist. LEXIS 21075 (N.D. Fla. 1995); *In re Terazosin Hydrochloride*, 220 F.R.D. 672, 696-97 (S.D. Fla. 2004) (courts in the Eleventh Circuit have recognized that “a presumption of impact properly arises in such cases where the defendants have *market power* and are alleged to have conspired with competing manufacturers”) (emphasis added).

III. CAN PLAINTIFFS’ EXPERT PROVIDE THE COMMON EVIDENCE?

Typically, plaintiffs attempt to show antitrust impact and the methodology for damages through an expert. Often the determination of whether this expert can truly deliver on a methodology to demonstrate antitrust impact through class-wide proof is the determining factor in a court’s predominance decision. There is considerable debate about how closely a court should examine such expert opinions. *See, e.g.*, J. Muehlberger, A. Carpenter, & G. Wu, *Court’s Use of Daubert-Lite Standard During Class Certification Proceedings is Analytically “Less Filling”*, ABA Class Actions & Derivative Suits, Vol. 14, No. 4 at 13. While there are a number of decisions that refuse any review of the merits of the expert’s opinions, the majority appear at least to examine (1) the scope of the expert’s opinion, (2) whether the expert has done analytical work and adjusted models to the specific industry and facts, (3) whether the expert’s method can show impact on a class-wide basis, (4) whether the model impermissibly relies on averages, and (5) whether the expert’s model addresses all allegations.

“A showing of impact requires an assessment of the actual world (where conspiratorial prices are allegedly paid) and the ‘but-for’ world.”

An expert must have a model and must show how the tests “would be adapted to the circumstances of that particular case.” *Polypropylene Carpet*, 178 F.R.D. at 624. Further, while the expert need not obtain all of the data and reach final conclusions, the expert needs to do more than suggest that certain methodologies (for example, regression) can be used to provide class-wide proof of impact. For instance, the *Windham* court wrote: “The plaintiffs argued that they ‘expect’ to develop a formula, which will simplify the computation of individualized damages, at some later point in the litigation,” but the court “should not certify the class merely on the assurance of counsel that some solution will be found.” *Windham*, 565 F.2d at 70.

“It is not permissible to use methods such as averaging damages to sweep individual issues under the judicial rug.”

The model must be able to account for the differences that exist in the actual world. See *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 2004 WL 1245275 at *3 (5th Cir. 2004) (unpublished; refusing certification notwithstanding expert’s claim that a regression analysis could be used to calculate damages because the analysis could not account for differences in relevant geographic conditions or negotiating skills); *Dry Cleaning*, 1993 WL 527928 at *3-4 (certification denied because proposed common formula did not address several factors, including differences in services, local market conditions, and payment methods; stating “[n]o formula proposed would be even-handed among class members or fair to defendants”).

The model cannot use averages as a basic tool to project impact on a class-wide basis when the averages cannot determine whether individual class members have actually been impacted. This is because averaging can blur and mask the differences that make class-wide proof impossible. When many (or even just some) potential class members fall outside a statistically reliable range designed to show impact, this is tantamount to saying that not every class member will be impacted. As the court stated in *Bell Atlantic*, “we have repeatedly held that where fact of [antitrust] damage cannot be established for every class

member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.” *Bell Atlantic*, 339 F.3d at 302. “It is not permissible to use methods such as averaging damages to sweep individual issues under the judicial rug.” *Id.* at 304–05. In *Bell Atlantic*, the plaintiffs’ expert proposed a model that used a nationwide average cost of labor. However, the record indicated that to make an adequate estimate, he needed to consider the “variegated nature of the businesses included in both the proposed class, together with a range of uses, depending on the size and technological sophistication of any given business. . . .” *Id.* at 304; see also *Eleven Line, Inc. v. North Tex. State Soccer Ass’n*, 213 F.3d 198, 208-09 (5th Cir. 2000) (antitrust damages formula inadequate because it was based on the average of rates of return of similar businesses and failed to account for differences in location and size); *compare Cardizem*, 200 F.R.D. at 350 (fact that methodologies contain “some form of averaging does not automatically render them methods of fluid recovery”).

Perhaps the most thorough discussion of an expert’s opinion on antitrust impact is *In re Polypropylene Carpet Antitrust Litigation*. The court reviewed the different approaches of other courts in scrutinizing antitrust class experts and “conclude[d] that it is proper to assess the validity of the proposed methodology to show impact, but arguments relying upon the veracity or authenticity of the facts to be ‘plugged into’ the formulas are inappropriate.” *Polypropylene Carpet*, 178 F.R.D. at 621; *Domestic Air*, 137 F.R.D. at 684 (“[T]he Court must scrutinize the evidence plaintiffs propose to use in proving their claims without unnecessarily reaching the merits to analyze predominance.”). The *Polypropylene Carpet* court concluded that an evidentiary hearing was necessary to determine whether the plaintiffs’ expert’s model could meet these requirements, noting (1) that plaintiffs must adduce at least some evidence to support the expert’s assumption that the list prices for carpet [basis for expert] are related to the actual

transaction prices, (2) that they must explain how their analytical framework will account for products not on standard price lists, and (3) that they must also show how their analytical framework will account for industry specific factors, including the diversity of products, customers, pricing practices, payment terms and business cycles. 178 F.R.D. at 618, 623–24.

Likewise *In re Agricultural Chemicals Antitrust Litigation*, 1995 U.S. Dist. LEXIS 21075 (N.D. Fla. 1995), rejected class certification because the expert could not provide common proof of impact. There, pesticide purchasers claimed that the agricultural chemical distributors and manufacturers engaged in a horizontal conspiracy to eliminate price competition to maintain prices of particular pesticides. The court, after a detailed review of the plaintiffs' expert, held that plaintiffs' expert (1) had not attempted to show that the price was higher than the "but for" price that would have existed, (2) had done no empirical study of whether the impact could be proven on a class-wide basis, (3) had not done anything to inform himself about the agricultural chemical industry (and he had no first hand experience or knowledge), (4) had ignored that market prices for agricultural chemicals would vary by location, crop, climate, soil and a host of other factors, (5) had not compared the prices for competing products, (6) had not compared prices before the conspiracy occurred, and (7) had not considered whether defendants had sufficient market power to be able to sell their products above a competitive level. The court noted that "the reality of the market for agricultural chemicals makes it virtually impossible that the 'but for price' . . . could be determined on a class-wide basis." *Id.* at *23. The court concluded that "the case law is clear that without providing a rule-of-thumb for pricing in this industry, it is difficult to establish that a certain price is above market level for purposes of determining antitrust impact." *Id.* at *32.

One of the most recent reviews of expert testimony in this context is *Blades v. Monsanto*

Company. There the plaintiff alleged price fixing in two specific seed markets. The court rejected the class, finding that plaintiffs' expert had failed to show common evidence of impact, because there were over fifty types of hybrid seeds in each seed market (some of which were only sold in certain regions), prices for such seeds varied widely, some were sold with no or negligible premiums, and thus individualized evidence was required to determine a competitive price that would have prevailed in a particular locality. *Blades*, 400 F.3d at 568-73. "The undisputed presence of negligible and zero list premiums indicates that if appellees performed their agreement, their performance was not across the board, but extended to some list prices and not to others. Consequently, to show injury from price inflation, each plaintiff would need to present evidence that the list prices of the seeds he purchased, not just some or even most of the hundreds of list prices on appellees' price lists, were inflated." *Id.* at 573. The expert "did not demonstrate, though, as he needed to, that class members could use common evidence to show inflation through the whole range of list prices." *Id.* at 575.

"The [Blades] court rejected the class, finding that plaintiffs' expert had failed to show common evidence of impact"

On the other hand, some courts have accepted expert testimony to satisfy the requirement of common evidence of impact. *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 333–34, 347, 349 (E.D. Mich. 2001) (certifying class where experts were using "the yardstick and before-and-after approaches;" "yardstick" compared the generic results for 28 other drugs to determine a "but for" price; expert already provided "studies showing the entry of a generic drug to the market results in significant savings and the defendants use similar data and similar methodologies to forecast;" experts used "bottom across" approach to avoid tracing overcharges); *Terazosin*, 220 F.R.D. at 699 (same reasoning). For instance, in *In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D. 677 (N.D. Ga. 1991), the defendants argued that differing competitive conditions and varying price structures at each airline hub meant that it would

not be possible to present common evidence of impact. However, the expert (who had both understanding of and experience in the industry and had already done some regression studies to support his conclusions), opined that there was clearly a structure in airline pricing notwithstanding the appearance of and changes in thousands of fares, rules and combinations. *Id.* The court further noted that plaintiffs submitted significant evidence under seal in the case to support these models. *See id.* at 688. Such evidence supported plaintiffs' argument that the "baseline" had been raised for all class members' fares. *Id.* at 689. The expert had also tested his model with real data and had taken precautions to avoid an inappropriate masking of averages that should not have been brought together.

Domestic Air demonstrates again the need for parties to present record evidence related to class certification, not merely legal argument. The court noted that plaintiff had presented empirical evidence while defendants had only provided criticism of plaintiffs' methodology. *Id.* at 622; compare *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 90 (E.D. Pa. 2003) (rejecting defendants' "but for" arguments because they provided "no evidence that some . . . customers would be better off" and because plaintiffs' expert provided rebuttal evidence); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 674 (D. Kan. 2004) (rejecting defendants' arguments about industry structure because they presented insubstantial evidence to support their generalized assertions).

Language in one recent decision certifying a class, *Linerboard*, could even be broadly read to suggest that the expert need not even choose a model, much less do any actual analysis at the class certification stage; however, a close reading of the *Linerboard* opinion indicates otherwise. *See Linerboard*, 305 F.3d at 155. The experts had already conducted "an extensive empirical investigation" and "effectively utilized supporting

data, including charts and exhibits, to authenticate their professional opinions that all class members would incur such damages" and had studied "the structure of the industry, including appellant's market power, geographical overlap, the fungible nature of the products, the inelastic demand and lack of substitution" and used "benchmarking" which "uses competitive prices for other comparable products to estimate the pattern of prices but-for the alleged misconduct . . ." *Id.* In fact, virtually all of the cases

"[There is a] need for parties to present record evidence related to class certification, not merely legal argument."

certifying a class involved experts who had actually conducted extensive analytical work before rendering an opinion. *E.g.*, *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 266 (D.D.C. 2002) (expert "analyzed" industry structure, "performed an economic and structural investigation," "compared" prices, and found "fungibility" and "substantial market power"); *Cardizem*, 200 F.R.D. 333-34, 347, 349 (discussed *supra*); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 696 (D. Minn. 1995) (plaintiffs' expert (an economist) "conducted" an "evaluation of the potash market" and "examined the prices paid before and during the alleged conspiracy, the Defendants' price lists, and actual transaction data"); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 531 (S.D. Fla. 1996) (noting that plaintiffs had "come forward with a considerable amount of evidence" and that the plaintiffs' expert had "propounded" a "methodology and conclusions").

IV. IS THERE COMMON EVIDENCE TO PROVE DAMAGES?

Finally, plaintiffs must demonstrate that damages can be proven on a classwide basis. Notably, a number of cases have held that if the impact element can be shown, the level of scrutiny for damages would be lessened. *Cardizem*, 200 F.R.D. at 348 (plaintiffs have "a limited burden with respect to showing that individual damage issues do not predominate"); *Polypropylene Carpet*, 178 F.R.D. at 618 ("far less demanding").

The better reasoned opinions, however, do not allow a plaintiff to “merely rely on guess work or speculation to establish damages.” *Bell Atlantic*, 339 F.3d at 303, 304–05 (“[T]he lenient standard for proving the amount of damages under antitrust laws should not be stretched so far as to permit recovery where there has been no evidence that competition had actually been eroded.”). In *Bell Atlantic*, the Fifth Circuit wrote that “[c]lass treatment, however, may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate.” *Bell Atlantic*, 339 F.3d at 307. There, the court held that differences in damages prevented predominance because numerous factors would have affected the amount of damages suffered by different class members in a case regarding failure to provide certain caller-ID information, including whether class members had certain telephone equipment, what type, and what type of business they were. *Id.* at 305 (noting the vast differences among businesses, including from sole proprietorships serving local customers to big complex businesses).

V. CAN THE COURT BIFURCATE TO SOLVE PROBLEMS?

If the plaintiff cannot demonstrate common evidence of damages, some plaintiffs and courts have proposed bifurcation. While this procedure has been used outside the antitrust context, *see Tardiff v. Knox County*, 365 F.3d 1, 6–7 (1st Cir. 2004), most courts reject it as a method to approve class certification in antitrust litigation. The Fifth Circuit rejected this argument in *Blue Bird*, writing that bifurcation “is not the usual course that should be followed, and that the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice.” *Id.* at 318. The court noted that, in general, defendants’ Seventh Amendment right means that they have a right to have “only one jury pass on a common issue of fact.” Liability under § 4 “necessarily includes proof of injury to business and property. Therefore, bifurcation to separate juries of liability and damages in a § 4 case inevitably introduces the possibility that in the liability phase the first jury might find that there was such injury, where the

second jury might on the same evidence of injury in the damage phase, find none.” *Id.* Therefore, because of the “vague dividing line between liability and damages” in antitrust cases, such bifurcation must “be approached with trepidation.” *Id.* Likewise, the Fourth Circuit rejected this option in *Windham*, because in antitrust cases there is “no neat dividing line between the issues of liability and damages.” *Windham*, 565 F.2d at 71. *But see In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d, 124, 141 (2nd Cir. 2001) (listing bifurcation as a possible option).

VI. LOST PROFIT CLAIMS INTRODUCE FURTHER COMPLICATIONS

Some antitrust plaintiffs also claim lost profit damages. When these damages are alleged, there are stronger reasons to deny class certification. For instance, in *Blue Bird*, the court noted that “[w]hen plaintiff elects to prove damage on the basis of lost profits or going concern value, it would seem that his proof necessarily would focus on the operation of his business.” *Blue Bird*, 573 F.2d at 325 n.31. A host of factors typically impacts the profitability of a business enterprise, including its location, its management, its consumer image, changing laws, its mix of customers, and luck. *See Bell Atlantic*, 339 F.3d at 306 (“Where an antitrust plaintiff seeks to project lost profits by comparing like businesses, it is the plaintiff who must demonstrate the reasonable similarity of the business whose earning experience he would borrow.”); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (“Plainly plaintiffs’ claim for lost profits damages was not a natural candidate for class-wide resolution; the calculation of lost profits is too dependent upon consideration of the unique circumstances pertinent to each class member;” discussing plaintiffs’ expert’s testimony).

VII. AFFIRMATIVE DEFENSES

Yet another issue that could defeat predominance are various affirmative defenses, such as the statute of limitations. There has been some disagreement among the circuits as to whether the statute of limitations can per se destroy predominance. *See Mowbray*, 208 F.3d 288, 295–96 (1st Cir. 2000) (“appropriate” to consider

“statute of limitation defenses” but rejecting a “*per se*” rule; “[p]redominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test”); *Broussard*, 155 F.3d at 342 (“when the defendant’s affirmative defenses (such as . . . the statute of limitations) may depend upon facts peculiar to each plaintiff’s case, class certification is erroneous”). Whatever affirmative defense is raised, the key remains that evidence must demonstrate that the issue is of major concern in the litigation rather than “arguments woven entirely out of gossamer strands of speculation.” *Mowbray*, 208 F.3d at 298.

VIII. CONCLUSION

In sum, class certification should not be automatic in price fixing litigation. It must be based upon common evidence of a violation and antitrust impact, and upon developed expert testimony adapted to the particular industry. Most of all, both parties must submit actual evidence rather than mere legal arguments.

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² The *Windham* court wrote that “conflict in result among the decisions seems to reflect more a factual difference in the cases themselves than a difference over legal principles. Thus in cases where the fact of injury and damage breaks down in what may be characterized as ‘virtually a mechanical task,’ ‘capable of mathematical or formula calculation,’ the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability.” *Windham*, 565 F.2d at 68.

³ *Domestic Air*, 137 F.R.D. at 689 (expert testimony sufficient that “the defendants’ actions thus resulted in an artificial ‘base’ price which became the ‘benchmark’ from which fares are negotiated or discounted”). Some cases contain language which could be read to incorrectly allow a presumption of injury when there is merely the allegation of a nationwide market without a close review of the evidence, including the nature of the industry and markets. See, e.g., *Lorazepam*, 202 F.R.D. at 29–30 (“[W]hen a defendant is alleged to have participated in a nationwide price fixing conspiracy, impact will be presumed as a matter of law, and the predominance requirement of Fed. R. Civ. P. 23(b)(3) will be satisfied.”).

DISMISSING IMPROPER CLASS ACTIONS AT THE PLEADING STAGE: THE NECESSITY FOR REVIEWING COURTS TO DEFER TO THE DISCRETION OF THE TRIAL COURTS

By Joshua G. Hamilton¹



I. INTRODUCTION

The recent judicial and legislative trend in class action litigation has been to curb the abuse caused by class action litigation aimed at benefiting attorneys as opposed to those who have suffered actual harm. See Comm. on the Judiciary, 108th Cong., The Class Action Fairness Act of 2005, S. Rep. No. 108-123, at 27 (2005) (noting that according to a *USA Today* poll, sixty-seven percent of the respondents believed that class actions mainly benefit lawyers, while only nine percent thought that plaintiffs benefit the most). This trend suffered a serious setback with the recent decision by the California Court of Appeal, *Blakemore v. Superior Court (Avon Products, Inc.)*, 129 Cal. App. 4th 36 (2005). In that case, the California Court of Appeal was faced with a matter of first impression in California – the standard of review of a trial court decision striking the class action allegations at the pleading stage. The *Blakemore* Court held that the trial court is afforded no discretion in making this decision, and that the reviewing court should apply a *de novo* standard of review in evaluating the trial court order. This article discusses the impact of this decision on class action litigation in California, and the implications on courts nationwide if they would likewise apply a *de novo* standard.

First, the holding contradicts the long-existing law and policy recognizing that trial courts are uniquely situated to make determinations regarding class matters at any stage of the lawsuit, and that their decisions are therefore granted substantial deference on review. Second, the holding is contrary to the trend in both California and the nation to rein in abuses prevalent in the class action

system. Third, a *de novo* standard of review encourages forum shopping to those courts which apply that standard, and automatically increases the settlement value of meritless cases because of the prospect of expensive discovery leading up to certification.

II. THE BLAKEMORE RULING

The *Blakemore* case involved allegations by several former and present Avon independent sales representatives that they received goods they did not order, returned the goods, and were not give a “credit” for the goods in their account statement. With leave of court, plaintiffs filed a first amended complaint, a proposed second amended complaint, a second amended complaint and a third amended complaint in an effort to correct their pleading defects and properly plead a class action. Therefore, the trial court provided plaintiffs’ counsel five opportunities to plead an ascertainable class, but plaintiffs never changed their class allegations. The trial court ruled that the claims of the class representatives were not typical of the purported class, and also that plaintiffs could never satisfy the community of interest requirement necessary to certify a class. On that basis, the trial court struck the class allegations without leave to amend.

The Court of Appeal, in evaluating the propriety of a trial court order striking the class allegations, was faced with a matter of first impression in California – the standard of review of a trial court order striking class allegations. The *Blakemore* court held that a superior court judge’s ruling striking class allegations at the pleading stage is reviewed *de novo*. The Court reasoned that “Avon’s motion to strike the class allegations ‘raises only the narrow issue whether this suit as a matter of law lacks sufficient community of interest to sustain a class action.’” *Blakemore*, 129 Cal. App. 4th at 891-92 (quoting *La Sala v. Am. Sav. & Loan Ass’n*, 5 Cal. 3d 864, 876 (1971)). The Court concluded that the issue was strictly a matter of law, which should be reviewed *de novo*. The *Blakemore* decision contravenes established principles regarding the deference afforded to trial courts with regard to the adjudication of class action matters.

III. TRIAL COURTS ARE UNIQUELY SITUATED TO EVALUATE THE VIABILITY OF A CLASS ACTION AT ALL STAGES OF A LAWSUIT

A. The *Blakemore* Decision Ignores The Strong Policy Reasons Other Courts Have Found For Using An Abuse Of Discretion Standard

The Court of Appeal holding in *Blakemore* is discordant with existing laws in California and nationwide that accord substantial deference to trial court decisions regarding the suitability of lawsuits for class treatment. Class action lawsuits undoubtedly serve an important and vital role in vindicating rights that otherwise might go unremedied. However, every year, employers, businesses, and the public at large incur costs in the hundreds of millions of dollars defending class action lawsuits filed nationwide that could never be certified, and rely on the trial judge to dispose of them in the most judicially expeditious manner possible.

Because of the complex nature of class action litigation, an abuse of discretion standard is absolutely essential to evaluate any determination by the trial court of the propriety of a class action. An abuse of discretion standard of review “is warranted whenever the trial judge’s ‘nether position’ in the judicial pyramid makes him a presumptively more capable decision maker” *Hurtado v. Statewide Home Loan Co.*, 167 Cal. App. 3d 1019, 1024 (1985) *disapproved on other grounds by Shamblin v. Brattain*, 44 Cal. 3d 474 (1988). Indeed, it is well established that trial courts have broad discretion to determine the suitability of a case for class treatment. *Lockheed Martin Corp. v. Superior Court (Carrillo)*, 29 Cal. 4th 1096, 1106 (2003) (quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000) (stating that “[b]ecause trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification”). The “ultimate decision as to the showing required at the pre-trial level in order to maintain the class action should be within the discretion of the trial court, providing it applies the correct criteria in

making its determination.” *Petherbridge v. Altadena Fed. Sav. & Loan Ass’n*, 37 Cal. App. 3d 193, 199-200 (1974). ““So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.”” *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 655 (1993) (quoting *Dean Witter Reynolds, Inc. v. Superior Court (Abascal)*, 211 Cal. App. 3d 758, 764-65 (1989)).

In evaluating the propriety of a class action, California courts look to the requirements and judicial interpretation of Rule 23 of the Federal Rules of Civil Procedure. *See Washington Mut. Bank, FA v. Super. Ct. (Briseno)*, 24 Cal. 4th 906, 922-23 (2001) (“We may look to the procedures governing federal class actions under Rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.) (Rule 23) for guidance.”) (citing *Linder*, 23 Cal. 4th at 437). Therefore, a reviewing court should apply the same standard of review to a lower court’s decision to strike or dismiss class allegations at the pleading stage, regardless of the venue. However, federal courts recognize that the district court should have discretion to make this determination at *all* stages of the litigation, including at the pleading stage. *Baum v. Great W. Cities, Inc.*, 703 F.2d 1197, 1210 (10th Cir. 1983) (in affirming district court order granting motion to dismiss class action allegations and motion to strike the class allegations, Tenth Circuit applied an abuse of discretion standard); *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985) (court did not abuse its discretion in refusing to allow class discovery where plaintiff could not plead prima facie case of class action).

Moreover, the California Court of Appeal, in at least one unpublished case, has applied an abuse of discretion standard to a trial court’s determination of the suitability of a class action at the pleading stage. *See Wheeler v. Avalonbay Communities*, No. B153535, 2002 WL 31630704 at *5 (Cal. App. Nov. 22, 2002) [unpub. opn.] (applying abuse of discretion standard to affirm trial court’s order striking class allegations). In addition,

a significant number of courts in other states have found that trial courts are vested with broad discretion to determine at any stage of the litigation whether a significant benefit would inure to both the court and the litigants in proceeding as a class action. These appellate courts will not overturn the decision to dismiss class allegations at the pleading stage absent a finding that the trial court abused its discretion. *See, e.g., Fuller v. State Farm County Mut. Ins. Co.*, 156 S.W.3d 658, 662 (Tex. Ct. App. 2005) (using an abuse of discretion standard to determine that the trial court did not err by striking class allegations since the plaintiff was not a member of the class she sought to represent); *Nolte v. Michels Pipeline Const., Inc.*, 265 N.W.2d 482, 487 (Wis. 1978) (employing an abuse of discretion standard under Wisconsin law to assess the propriety of the trial court’s decision to dismiss class action allegations on demurrer); *Johnson v. Chrysler Credit Corp.*, 337 A.2d 210, 214 (Md. App. 1975) (finding that pursuant to Maryland law, trial court did not abuse its discretion in dismissing class allegations on demurrer); *Cubberly v. Chrysler Corp.*, 437 N.E.2d 1, 5 (Ohio App. 1981) (using an abuse of discretion analysis under Ohio law in determining that the trial court did not err in striking class allegations at the pleading stage); *Levine v. Empire Sav. & Loan Ass’n*, 592 P.2d 410, 413 (Colo. 1979) (ruling that pursuant to Colorado law, the trial court did not abuse its discretion in dismissing the class action on the basis of the pleadings alone without an evidentiary hearing).

***“[F]ederal courts recognize that the district court should have discretion to make [the class action] determination at all stages of the litigation, including at the pleading stage.*”**

B. A Determination Of The Propriety Of A Class Action At The Pleading Stage Gives All Benefit Of The Doubt To The Plaintiffs

Where a trial court makes a class determination after a motion for certification, each party is permitted to submit evidence and the court must make a determination based on the factual record. However, when a trial court evaluates whether the complaint's allegations can ever support a class action, it assumes that the evidence will show the allegations to be true. Therefore, the trial court may exercise its discretion as to the manageability and benefits to the court and litigants in proceeding as a class action *assuming that plaintiff will be able to prove everything in the complaint.* Trial courts are therefore called upon to evaluate at the pleading stage whether no "reasonable possibility" exists that the case can proceed as a class action. *Canon U.S.A., Inc. v. Superior Court (Rhulen Co.)*, 68 Cal. App. 4th 1, 5 (1998). If the plaintiff cannot show a "reasonable possibility" of establishing the necessary elements of a class action, the trial court should strike the class allegations, thereby dispensing with unnecessary class discovery and evidentiary hearings. *Id.* This process requires the trial judge to draw on the judge's unique experience in effectively adjudicating complex class suits. See *Newell v. State Farm Gen. Ins. Co.*, 118 Cal. App. 4th 1094, 1104 (2004) (examining the nature of the claims at the pleading stage to determine whether the benefits to the courts and litigants in proceeding as a class action exceed those of litigating individual claims). As such, the trial court has an obligation to evaluate as early as possible the respective benefits and burdens and allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. See *Canon U.S.A., Inc.*, 68 Cal. App. 4th at 5.

In order to successfully join parties through a class action lawsuit, it "must be the superior means

of resolving the litigation, for both the parties and the court." *Newell*, 118 Cal. 4th at 1101. This determination requires the trial court to assess whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Silva*, 49 Cal. App. 4th 345, 350. As trial courts are in a unique position to "evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." *Lockheed Martin*, 29 Cal. 4th at 1106 (quoting *Linder*, 23 Cal. 4th at 435). Thus, when the facts underlying particular claims are such that a plaintiff cannot establish a prima facie case of community of interest, the trial court must undertake an identical evaluation at

"[W]hen a trial court evaluates whether the complaint's allegations can ever support a class action, it assumes that . . . plaintiff will be able to prove everything in the complaint."

the pleading stage as that required on a class certification motion, and, if appropriate, dismiss meritless class allegations. This procedural safeguard deters abuses of the class action system by disposing of suits that are frivolous, vexatious, or otherwise unsuitable for class treatment at an early stage, thereby limiting the leverage of attorneys to demand unreasonable or excessive settlements.

In a study on class actions, the RAND Institute found that "[j]udges hold the key to improving the balance of good and ill consequences of damages class actions. . . . If more judges in more circumstances dismiss cases that have no legal merit . . . the balance of public good and private gain will improve." RAND Inst. for Civ. Justice Mar. 24, 1999, Deborah R. Hensler, et. al., *Class Action Dilemmas, Pursuing Public Goals for Private Gain, Executive Summary*, at 31; see also Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 Ga. L. Rev. 927, 983 (2004) (emphasizing the importance of an active judiciary in ensuring fairness in class action claims).

Where the trial court assumes all of the allegations in the complaint are true and that a community of interest exists, the court is still afforded the discretion to determine whether the parties and the court would benefit from class action treatment. An abuse of discretion standard allows the trial courts to take advantage of their unique expertise to effectively and efficiently adjudicate class actions and other complex lawsuits with these goals in mind. This evaluation cannot be clearly delineated as a question of law or a question of fact, but rather it constitutes a weighing of benefits and burdens that the trial court is in a unique position to make. Because the trial court's experience or position provides it with a superior opportunity to understand the implications that cannot be determined from a four-corners evaluation of the most recent pleading, greater deference is warranted. See *Hurtado*, 167 Cal. App. 3d at 1024. On the other hand, imposing a *de novo* standard of review in the context of a court's own determination of the manageability of a particular case invalidates the special role of these judges by requiring appellate courts to second-guess their evaluations, without affording any deference to the trial court.

The *Blakemore* ruling eliminates a trial court's ability to weigh the benefits of class treatment at the pleading stage. This dynamic presents class attorneys with significant leverage through which they can "essentially force corporate defendants to pay ransom to class action attorneys by settling – rather than litigating – frivolous lawsuits." Class Action Fairness Act of 2005, S. Rep. No. 108-123 IV.D.2 (2003). Judge Richard A. Posner in the Seventh Circuit has stated that defendants facing millions of dollars in potential liability "may not wish to role the dice" by enduring a long and costly litigation process regardless of the merits of the claims, even if there are various defenses available. *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Recognizing this "intense pressure to settle," Judge Posner pointed to the assertion of Judge Henry J. Friendly, referring to

"settlements induced by a small probability of an immense judgment in a class action as 'blackmail settlements.'" *Id.* (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973), and characterizing this concern as "legitimate").

C. The Holding Is Contrary To The Trend In State And Federal Courts To Rein In Abuses Of Class Action Litigation.

In response to mounting concerns over these abuses in the class action system, Congress passed the Class Action Fairness Act of 2005 ("CAFA"). In enacting this bill, Congress expressly found that "over the past decade, there have been abuses of the class action device that have – (A) harmed class members with legitimate concerns and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system."

"[I]mposing a de novo standard of review in the context of a court's own determination of the manageability of a particular case invalidates the special role of [trial] judges."

Id. Furthermore, Congress also noted the abuses of the class action system by self-interested lawyers stating that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where – (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Id.* Moreover, a majority of the Senate found that over the past decade, class action abuses have harmed plaintiffs with otherwise legitimate claims, have negatively impacted interstate commerce while often leaving class members with "little or no benefit," and have undermined respect for the legal system. *Id.*

In 2004, California voters enacted Proposition 64 to combat many of the same abuses of mass litigation arising out of California's unfair competition laws. Proposition 64 aims at curbing frivolous lawsuits by eliminating claims where "no client has been injured in fact," and where the suit is merely "a means of generating attorney's fees without creating a corresponding public benefit." Cal. Bus. & Prof. Code § 17200 *et seq.* (West

2005); 2004 Cal. Legis. Serv. Prop. 64 (Proposition 64) (including findings that frivolous lawsuits clog courts, and harm consumers and businesses by causing price increases, layoffs and business relocations); Mathieu Blackston, *California's Unfair Competition Law – Making Sure the Avenger is not Guilty of the Greater Crime*, 41 San Diego L. Rev. 1833, 1843 (2004) (concluding that unfair competition suits were often brought by lawyers to extort quick settlements or to increase their settlement leverage in individual suits); see also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 598 (1998) (Brown, J., dissenting) (referring to § 17200 as a “standardless, limitless, attorney fees machine”).

IV. A DE NOVO STANDARD ENCOURAGES FORUM SHOPPING

There is no question that forum is a key consideration in bringing a class action lawsuit. See William D. Underwood, *Reconsidering Derivative-Venue in Cases Involving Multiple Parties and Multiple Claims*, 56 Baylor L. Rev. 579, 581 n.1 (Spring 2004) (quoting Professor Louis Mudrow that “every trial lawyer in this chamber, I think, would agree that venue or the county in which the case is to be tried, is without question one of the most significant factors, perhaps the most significant factor, in the outcome of the case[]”). In a period where both federal and state courts are implementing reforms to curb the abuses of class action litigation, the court of appeal decision in *Blakemore* symbolizes a clear move in the opposite direction.

In the situation where the trial court has followed the case through several iterations of the pleadings, and can determine that, assuming the allegations are true, the case is unsuitable and unmanageable as a class action, a court should dismiss it at the pleading stage. However, if the *Blakemore* rule is applied, the trial court may choose not to do so, but allow the case to proceed to certification because a reviewing court will not even consider its discretion in making the determination. In addition, a plaintiff may be undeterred by the trial court’s ruling striking the class allegations at the pleading stage because the plaintiff will have another opportunity with the court of appeal. This

knowledge that an appellate court will disregard the discretionary judgment of the trial court and review class allegations anew substantially increases the nuisance value of a lawsuit, thereby adding to the leverage of plaintiffs’ attorneys to exact unreasonable settlements.

It is well established that a perception exists that some states are more “friendly” to class action lawsuits than others. See Martin Kasindorf, *Robin Hood Is Alive In Court, Say Those Seeking Lawsuit Limits*, USA Today, Mar. 8, 2004. A report released this year by the United States Chamber of Commerce indicates that California is one of the five worst states for defendants in terms of creating a fair and reasonable environment for class action litigation. The Harris Poll 2005 U.S. Chamber of Commerce State Liability Systems Ranking Study, No. 22550, Mar. 8, 2005. While Proposition 64 may serve to mitigate some of its effects, the decision in *Blakemore* will only increase the traffic of class action litigation to California.

V. CONCLUSION

The importance to a plaintiff’s attorney in choosing a forum to bring a class action is the first, and perhaps most critical, strategic pre-filing issue. The knowledge that a trial court in one jurisdiction is shackled from using its discretion to strike or dismiss class action allegations at the pleading stage would serve to invite forum shopping into that jurisdiction. Therefore, a trial court that might have dismissed the class action at the pleading stage, and prevented needless and expensive class discovery, would be forced to allow the discovery and permit the case to proceed to a class certification motion. This proposition automatically increases the settlement value of even the most frivolous cases, and perpetuates an increased number of class actions in that forum. For those reasons, defense counsel should attempt to mitigate the effects of the *Blakemore* decision, and urge an abuse of discretion standard of review.

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WHEN DOES A CLASS ACTION “COMMENCE” UNDER CAFA?

By Henry Pietrkowski¹



I. INTRODUCTION

The Class Action Fairness Act of 2005 (“CAFA”) applies “to any civil action commenced on or after the date of enactment of this Act,” which was February 18, 2005. Pub. L. 109-2, § 9. This language seems to indicate that CAFA does not apply to actions already pending before CAFA’s enactment. But don’t tell that to defense counsel whose enterprising attempts to remove pending state court actions have spawned dozens of federal court opinions over the past year regarding when an action “commenced” under CAFA.

So far, the federal courts appear to be in agreement on two things: (1) removal of a case to federal court does not “commence” a new action under CAFA, and (2) state law provides the rule of decision for determining when an action “commences” under CAFA. The latter rule has led to some very interesting and unexpected results. Just as significantly, a separate line of cases has developed concerning whether an amendment that adds new claims or parties may “commence” a new action, thereby allowing it to be removed under CAFA.

II. REMOVAL DOES NOT “COMMENCE” A NEW ACTION UNDER CAFA

Soon after CAFA was enacted, defendants immediately set out to test whether the Act applied to pending cases. They argued that a civil action “commenced” under CAFA when it was *removed* to federal court, and not when it was filed in state court. But the Tenth Circuit roundly rejected this argument in *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005), *superseding* 404 F.3d 1232 (10th Cir. 2005), relying on the general federal rule that a lawsuit commences with “the filing of the original complaint in a court of competent jurisdiction.” *Id.* at 1094. The Tenth Circuit also relied on rules of construction, legislative history

and public policy to bolster its analysis. *Id.* at 1094-97.

The First, Seventh and Ninth Circuits have now joined the Tenth Circuit in uniformly holding that removal of an action does not “commence” an action under CAFA. *See Natale v. Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 726-27 (7th Cir. 2005); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686-89 (9th Cir. 2005). The Ninth Circuit went so far as to call the defendant’s argument “nonsensical, since every action that could be removed must have been previously commenced.” *Bush*, 425 F.3d at 687. Nor does it matter that the action was removed within the initial 30-day period after service of the state court filing. *See Natale*, 424 F.3d at 44; *Pfizer*, 417 F.3d at 726-27.

III. EACH STATE’S LAW DETERMINES WHEN AN ACTION “COMMENCES” UNDER CAFA

The fact that removal does not “commence” a lawsuit under CAFA is only the beginning of the analysis, however. Most federal courts have held that the question of when an action “commenced” under CAFA depends on each “state’s own laws and rules of procedure.” *See, e.g., Bush*, 425 F.3d at 686. This is where it gets interesting. Some states’ procedural rules provide that a civil action does not “commence” merely with the filing of a complaint.

For instance, in *Patterson v. Dean Morris, L.L.P.*, No. 06-30215, _ F.3d __, 2006 WL 1156388, at *1 (5th Cir. May 3, 2006), the plaintiffs “fax filed” their complaints in Louisiana state court on February 17, 2005 – the day before CAFA’s enactment. Louisiana law provides that a party may file an action by fax, but only if the applicable filing fee is paid to the clerk within five days. *Id.* The plaintiffs paid only a portion of the filing fee within the five-day period, and did not pay the rest until June 14, 2005. *Id.* at *2. The defendants therefore removed under CAFA, arguing that the plaintiffs’ failure to pay the entire filing fee within the five-day period meant that the action did not “commence” under Louisiana state law prior to CAFA’s effective date. *Id.* The Fifth Circuit,

however, affirmed the district court's ruling that, under Louisiana law, the plaintiffs did pay a sufficient portion of the filing fee to "commence" the case on February 17, 2005. Therefore, the action could not be removed to federal court under CAFA. *Id.* at *2-3.

Similarly, in *Dinkel v. General Motors Corp.*, 400 F. Supp. 2d 289, 292-93 (D. Me. 2005), the district court looked to the Kansas Rules of Civil Procedure to determine whether an action "commenced" before or after CAFA's effective date. The Kansas rule provides that a lawsuit is commenced only if the complaint is filed *and process is served within 90 days*; if process is served more than 90 days later, then the lawsuit does not commence until the date of service. *Id.* at 292 (citing K.S.A. § 60-203(a)). Because certain defendants were served more than 90 days after the Kansas state court complaint was filed, and after CAFA's effective date, the district court held that the entire action was removable under CAFA. *Id.* at 293.

Likewise, in *Eufala Drug, Inc. v. TDI Managed Care Servs., Inc.*, No. 2:05-CV-293-F, 2005 WL 3440635, at *3 (M.D. Ala. Dec. 14, 2005), the district court relied on the Alabama Supreme Court's decision that "the filing of the complaint commences the action only if it is filed 'with the *bona fide* intention of having it immediately served.'" *Id.* (citing *Ward v. Saben Appliance Co.*, 391 So. 2d 1030, 1035 (Ala. 1980)). Thus, even though the plaintiff had filed his state-court complaint on February 14, 2005 – four days before CAFA's enactment – the case was removable under CAFA because the plaintiff had not demonstrated its "*bona fide* intention" to serve the defendant until February 28, 2005, when it provided summonses to the clerk of court. *Id.*; see also *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, No. 2:05-CV-292-F, 2005 WL 3440636, at *4 (M.D. Ala. Dec. 14, 2005) (same holding).

A different result was reached in *Lussier v. Dollar Tree Stores, Inc.*, No. CV 05-768-BR, 2005

WL 2211094, at *2-3 (D. Or. Sept. 8, 2005), where the district court reviewed two competing Oregon procedural rules and determined that only one of them applied to determine when an action "commenced" under CAFA. Oregon Rule of Civil Procedure 3 provides that an action is "commenced by filing a complaint with the clerk of court." However, Or. Rev. Stat. § 12.020 provides that, for statute-of-limitations purposes, an action is commenced on the date of filing only if the summons is published or served within 60 days; if it is served more than 60 days later, it is commenced as of the date of service. *Id.* The district court determined that, because Or. Rev. Stat. § 12.020

"[D]istrict courts . . . have had to analyze their own state procedural laws to determine when an action 'commenced' for purposes of CAFA."

applied only for limitations purposes, it was more appropriate to apply the general rule in Oregon Rule of Civil Procedure 3 to determine when an action "commenced" under CAFA. *Id.* at *3. The court therefore found that

the case was not properly removed because the lawsuit was filed four days before CAFA's enactment. *Id.*; see also *Hensley v. Computer Sciences Corp.*, No. 05-CV-4081, 2006 WL 662463, at *2-3 (W.D. Ark. Mar. 15, 2006) (conducting a similar analysis of Arkansas' competing procedural rules, and determining that an action is commenced for CAFA purposes when the complaint is filed, and not when process is served under the limitations-related rule).

Other district courts also have had to analyze their own state procedural laws to determine when an action "commenced" for purposes of CAFA. See, e.g., *Werner v. KPMG LLP*, 415 F. Supp. 2d 688, 701-09 (S.D. Tex. 2006) (examining Texas statutes and cases to determine whether certain defendants were "parties" to the action prior to CAFA's effective date); *Brown v. Kerkhoff*, No. 4:05 CV 00274 JEG, 2005 WL 2671529, at *9-12 (S.D. Iowa Oct. 19, 2005) (examining Iowa law to determine that the plaintiff's failure to file signature page of pleading prior to CAFA's effective date did not "commence" a new action).

IV. AMENDMENT OF CLAIMS AND PARTIES MAY “COMMENCE” A NEW ACTION UNDER CAFA

Even if the original state court complaint was timely “commenced” under the applicable state court rules, the question still remains whether an *amendment* to add new parties or claims “commences” a new “civil action” for purposes of removing the case to federal court under CAFA. This analysis can result in the removal of cases that have been pending in state court for years prior to CAFA’s enactment.

A. View That No Amendment Can “Commence” A New Action

One line of cases, beginning with *Weekley v. Guidant Corp.*, 392 F. Supp. 2d 1066, 1067-69 (E.D. Ark. 2005), holds that no amendment to an original state court action can possibly “commence” a new action under CAFA. The reasoning is one of simple statutory construction: CAFA applies “to any *civil action* commenced on or after the date of enactment of this Act.” Pub. L. 109-2, § 9 (emphasis added). According to the *Weekley* court, Congress’ use of the unambiguous term “civil action” was intended to refer to “the whole case,” which “can only be commenced once.” *Id.* at 1067. “By definition, a civil action must already have been commenced before a pleading can be amended.” *Id.* at 1068. If Congress intended that the amendment of a complaint would “commence” a new proceeding, it could have expressly said so, but did not. *See id.*

At least three other district courts have followed the *Weekley* court’s reasoning. *See Hot Spring County Solid Waste Auth. v. United Health Group*, No. Civ. 05-6065, 2006 WL 376545, at *2-3 (W.D. Ark. Jan. 13, 2006); *Smith v. Collinsworth*, No. 4:05CV01382-WRW, 2005 WL 3533133, at *2 (E.D. Ark. Dec. 21, 2005); *Comes v. Microsoft Corp.*, 403 F. Supp. 2d 897, 903 (S.D. Iowa 2005). Note, however, that *Weekley* (which was issued by a district court in the Eighth Circuit) may have been implicitly overruled by the Eighth Circuit’s decision in *Plubell v. Merck & Co.*, 434 F. 3d 1070, 1071-72 (8th Cir. 2006), which applied a “relation back”

analysis to determine whether an amended class definition “commenced” a new action under CAFA.

B. View That An Amendment May “Commence” A New Action

A second of line of cases, exemplified by *Knudsen v. Liberty Mutual Insurance Co.*, 411 F.3d 805, 807 (7th Cir. 2005), holds that, in certain circumstances, amending an existing state-court complaint may “commence” a new action for removal purposes under CAFA. While the Seventh Circuit in *Knudsen* made clear that “routine” amendments do not “commence” a new action under CAFA, it also stated that:

[A] new claim for relief (a new ‘cause of action’ in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes.

Id.

The court in *Knudsen* stated that a “relation back” approach analogous to Federal Rule of Civil Procedure 15(c) might be used to determine when a new claim is “sufficiently independent of the original contentions that it must be treated as fresh litigation.” *Id.* Later Seventh Circuit decisions conflict, however, on whether this “relation back” approach should be based on state law or federal law. *Compare Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) (“Although we used Fed. R. Civ. P. 15(c) in *Knudsen* to illustrate the difference between claims that relate back and those that do not (and so may be treated as commenced when added to suit), state rather than federal practice must supply the rule of decision.”) *with Schillinger v. Union Pac. R.R. Co.*, 425 F.3d 330, 334-35 (7th Cir. 2005) (noting in *dicta* that “CAFA may make state rules about statutes of limitations irrelevant to the type of commencement that is necessary for federal removal”).

C. Addition of New Defendants

In *Knudsen v. Liberty Mutual Insurance Co.*, 435 F. 3d 755 (7th Cir. Jan. 27, 2006) (*Knudsen II*), the Seventh Circuit held that the expansion of the plaintiff's class definition after CAFA's effective date was sufficient to "commence" a new action under CAFA. The new class definition expanded the claims of systematic insurance underpayments from the original defendant, Liberty Mutual Insurance Company, to about 35 new defendants, which were "affiliates and subsidiaries" of Liberty Mutual. *Id.* at 756-57. The Seventh Circuit pointed out that the state court's expansion of the case beyond the original defendant was particularly egregious because many of the affiliated insurance firms had adjusted their own insurance claims, but were prevented from raising any individualized defenses because of a default order. *Id.* at 757-58. The Seventh Circuit concluded:

"[C]ourts . . . have held that the plaintiff's addition of a new defendant after CAFA's effective date 'commenced' a new action under CAFA, allowing it to be removed."

The conduct of plaintiffs and the state judge in this litigation, turning an arguable error in discovery into a sprawling proceeding in which Liberty Mutual will be required to pay on account of other insurers' decisions taken long ago under different rules for calculating proper payment, and without any opportunity to defend itself on the merits or even insist that the policies' actual terms be honored, illustrates why Congress enacted the Class Action Fairness Act.

Id. at 758.

The Fifth Circuit in *Braud v. Transport Serv. Co. of Ill.*, _ F. 3d _, 2006 WL 880051, at *2 (5th Cir. Apr. 6, 2006), agreed with the Seventh Circuit that, "amendments that add a defendant 'commence' the civil action as to the added party." The Fifth Circuit reasoned that CAFA was not intended to replace existing Supreme Court case law, which held that, "a party brought into court by

an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court." *Id.* (citing *United States v. Martinez*, 195 U.S. 469, 473 (1904)). Thus, it "would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice." *Id.* (citing *Miller v. M'Intyre*, 31 U.S. (6 Pet.) 61, 64 (1832)). The Fifth Circuit further agreed with the Seventh Circuit that the addition of a new defendant "opens a new window of removal" under 28 U.S.C. § 1446(b). *Id.* at *3.

At least two federal district courts in other circuits similarly have held that the plaintiff's addition of a new defendant after CAFA's effective date "commenced" a new action under CAFA, allowing it to be removed. *See Robinson v. Holiday Universal, Inc.*, No. Civ. A. 05-5726, 2006 WL 470592, at *2 (E.D. Pa. Feb. 23, 2006); *Adams v. Fed. Materials Co.*, No. Civ. A. 5:05CV-90-R, 2005 WL 1862378, at *4 (W.D. Ky. July 28, 2005).

Most recently, however, the Tenth Circuit in *Prime Care of Northeast Kansas, LLC v. Humana Ins. Co.*, No. 06-3024, _ F.3d _, 2006 WL 1305229, at *2-4 (10th Cir. May 12, 2006), criticized the Fifth and Seventh Circuits for what it perceived as their strict view that *any* newly added defendant "commences" a new action under CAFA. The Tenth Circuit held instead that relation-back principles always should guide the inquiry, even where a new defendant is involved:

[W]hen Congress tied CAFA's effective date to the legal concept of commencement, it did so presumptively aware that – contrary to the principle invoked by the Fifth and Seventh Circuit cases applying CAFA – an amendment adding a defendant does not necessarily commence a new action as to that

defendant. . . . Rather, the relevant landscape in which both of these legal concepts reside has for some time been governed by the relation-back principle.

Id. at *4.

But this apparent inconsistency between the Tenth Circuit, on the one hand, and the Fifth and Seventh Circuits, on the other, may in fact be a “distinction without a difference.” *Braud*, 2006 WL 880051, at *4. The Fifth Circuit in *Braud* expressly noted that it would have reached the same result under the relation-back analysis of Fed. R. Civ. P. 15(c)(3) and its Louisiana state counterpart. *Id.* Moreover, the Tenth Circuit noted that, under the federal relation-back analysis (and that of most states), “an amendment adding a defendant relates back to the original pleading only if the defendant ‘received such notice of the institution of the action that the party [will/would] not be prejudiced in maintaining a defense’ and, in fact, ‘knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.’” *Prime Care*, 2006 WL 1305229, at *4 n.3. Thus, “[i]n effect, an amendment adding defendants to a case will relate back, and thus not commence a new case [under CAFA], only when it really is not a new case against those defendants.” *Id.* (emphasis added).

A related question is what happens when the plaintiff voluntarily dismisses the new defendant who triggered CAFA’s removal jurisdiction? Does the district court still retain subject matter jurisdiction under CAFA? Courts have come to different conclusions on this point, depending on the reason for the voluntary dismissal.

Some district courts have agreed to remand cases to state court where the plaintiff’s voluntary dismissal motion is accompanied by evidence or argument that the new defendant was added as a result of a “mistake” or “scrivener’s error,” particularly if the defendant had notice of the mistake. *See Schillinger*, 425 F.3d at 333; *Miller v. Hypoguard USA, Inc.*, No. 05-CV-0186, 2006 WL 1285343, at *7 (S.D. Ill. May 8, 2006); *Adams v. Ins. Co. of North Am.*, 2006 WL 897945, at *16-17

(S.D.W.Va. Mar. 30, 2006); *Brown*, 2005 WL 2671529, at *12-16; *see also Heaphy v. State Farm Mut. Auto. Ins. Co.*, No. C05 5404RBL, 2005 WL 1950244, at *3 (W.D. Wash. Aug. 15, 2005) (“The court does not believe that the remand question can or should turn on the short lived, mistaken addition of a related party.”).

Other courts, however, have taken a harder line, holding that once an action is properly removed due to the addition of a new defendant, the plaintiff cannot “unring the bell” by subsequently filing a motion to voluntarily dismiss that defendant. *See Braud*, 2006 WL 880051, at *4-5; *Robinson*, 2006 WL 470592, at *3; *Dinkel*, 400 F. Supp. 2d at 293-95. These cases reason that, under the removal statute, the entire “action” is removable, not just the claims against the new defendant, “so the subsequent dismissal of the removing defendant cannot render the entire lawsuit improperly removed.” *Braud*, 2006 WL 880051, at *4. The Fifth Circuit did note, however, that a federal court may properly remand the case if the voluntary dismissal of the removing defendant is made for “legitimate purposes,” and is not simply an attempt to divest the court of subject matter jurisdiction. *Id.* at *5.

D. Addition of New Plaintiff Class Representatives

Both the Seventh and Eighth Circuits recently held that the substitution or addition of new class representatives does not “commence” a new suit under CAFA.

In *Plubell v. Merck & Co.*, 434 F. 3d 1070 (8th Cir. 2006), the Eighth Circuit applied a “relation back” analysis under Fed. R. Civ. P. 15(c) and its Missouri state counterpart to determine whether the substitution of class plaintiffs “commenced” a new action under CAFA. *Id.* at 1071-72. The Eighth Circuit concluded that there was no new action under CAFA because the original and amended complaints set forth the same alleged conduct, and the substituted plaintiff already had been an absent class member so the defendant was not unfairly prejudiced in preparing its defense. *Id.* at 1073-74.

The Seventh Circuit reached the same conclusion in *Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006), reasoning that the “[s]ubstitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and normally an unexceptional (‘routine’) feature of class action litigation both in the federal courts and in the Illinois courts.” Because the substitution of named plaintiffs did not involve a different transaction or occurrence than the original action, no new action was “commenced” under CAFA. *Id.* at 787-88. Various district courts also have found that adding or substituting new class representatives did not “commence” a new action under CAFA. *See, e.g., Cuesta v. Ford Motor Co., Inc.*, No. CIV-06-61-S, 2006 WL 1207608, at *2 (E.D. Okla. May 1, 2006); *Bemis v. Allied Prop. & Cas. Ins. Co.*, No. 05-CV-751-DRH, 2006 WL 1064067, at *6 (S.D. Ill. Apr. 20, 2006); *In General Motors Corp. Dex-Cool Prods. Liab. Litig.*, No. CIVMDL-03-1562GPM, Civ. 05-10007-GPM, 2006 WL 644793, at *1-2 (S.D. Ill. Mar. 9, 2006).

In contrast to these two cases, the district court in *Heaphy* held that removal under CAFA was proper where the amended complaint contained a new class plaintiff and three new causes of action. 2005 WL 1950244, at *1. In that case, however, the original named plaintiff had lost an arbitration of her claims, which meant that no class representative was in place when the amended complaint was filed. *Id.* The court concluded that the new class representative, who asserted new and different claims than the original class representative, could not be substituted without commencing a new action that allowed for removal under CAFA. *Id.* at *2-5.

E. Expansion of Class Definition and Addition of New Claims

The Seventh Circuit has twice refused to find that a new action was “commenced” under CAFA simply because of an expanded class definition. In *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 749-51 (7th Cir. 2005), the Seventh Circuit held that the expansion of the class definition in a consumer fraud case to include consumers who purchased toner cartridges as well as those who purchased

printer drum kits was not sufficient to “commence” a new action. The court further held that the expanded class definition did not add any new “parties” because absent class members “are not litigants themselves.” *Id.* at 750. Similarly, in *Schillinger*, the Seventh Circuit rejected the defendant’s claim that the expansion of the class definition from Illinois land owners to land owners nationwide was sufficient to “commence” a new action under CAFA. 425 F.3d at 334.

Many district court cases have followed the Seventh Circuit’s lead by remanding cases that defendants attempted to remove under CAFA based merely on insubstantial changes to the plaintiff’s substantive claims or class definition. *See, e.g., Whitehead v. The Nautilus Group, Inc.*, No. 05-CV-4074, 2006 WL 1027147, at *3-4 (W.D. Ark. Apr. 18, 2006); *In re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, No. 1:00-1898, MDL 1358 (SAS), M 21-88, 2006 WL 1004725, at *5-6 (S.D.N.Y. Apr. 17, 2006); *Adams*, 2006 WL 897945, at *17-19; *Carpanelli v. American Standard Cos. Inc.*, No. C 06-0004 WDB, 2006 WL 568307, at *3-5 (N.D. Cal. Mar. 3, 2006).

But *Schorsch* and *Schillinger* must be contrasted with the Seventh Circuit’s later decision in *Knudsen II*, discussed above, which found that an expanded class definition created a new action by adding about 35 new defendants to the lawsuit. 435 F.3d at 756-58. Other cases also have found that a significant expansion of the class definition after CAFA’s effective date “commenced” a new action. *See, e.g., Senterfitt v. Suntrust Mortgage, Inc.*, 385 F. Supp. 2d 1377, 1378, 1380-81 (S.D. Ga. 2005) (holding that amended complaint, which increased the class period from 4 years to 20 years, “commenced” a new action that was removable under CAFA); *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310, 1313-17 (E.D. Okla. 2005) (holding that a new action was “commenced” under CAFA where the amended petition filed after CAFA’s effective date raised, for the first time, class allegations and new claims for fraud and bad faith). Thus, whether any particular amendment will be deemed sufficient to “commence” a new action under CAFA will depend on the circumstances of each case.

V. FILING A FEDERAL COURT SUIT COMMENCES A NEW ACTION UNDER CAFA EVEN IF THAT SAME ACTION WAS PENDING IN STATE COURT BEFORE CAFA'S ENACTMENT

In *Steinberg v. Nationwide Mutual Insurance Co.*, No. 2:05-CV-3340, 2006 WL 538553 (E.D.N.Y. Mar. 7, 2006), the plaintiff had filed a state court complaint prior to CAFA's effective date and then subsequently filed a substantially similar federal court complaint *after* CAFA's effective date. The defendant moved to dismiss the case for lack of subject matter jurisdiction based on the existence of the pre-CAFA state court complaint. The court, however, found "no compelling reason under CAFA, or any other federal law, to dismiss the Plaintiff's action solely based on the similar action pending in state court." *Id.* at *7.

While the state court action in *Steinberg* remained pending at the time of the court's decision, the ruling also may have implications for suits filed in state court and voluntarily dismissed prior to CAFA's effective date, and which are then re-filed in federal court after CAFA's effective date. It will be interesting to see whether courts will give no deference to the state court action (as in *Steinberg*), or whether they will engage in a "relation back" analysis under the appropriate state law.

VI. CONCLUSION

The question of when a civil action "commences" under CAFA is not nearly as self-evident as one might expect. While the federal courts generally agree that they must look to state procedural law to determine when an action "commences," that is where their agreement ends. Class action practitioners must remain vigilant of these jurisdictional issues, particularly when an existing state-court class action complaint has been amended after CAFA's effective date.

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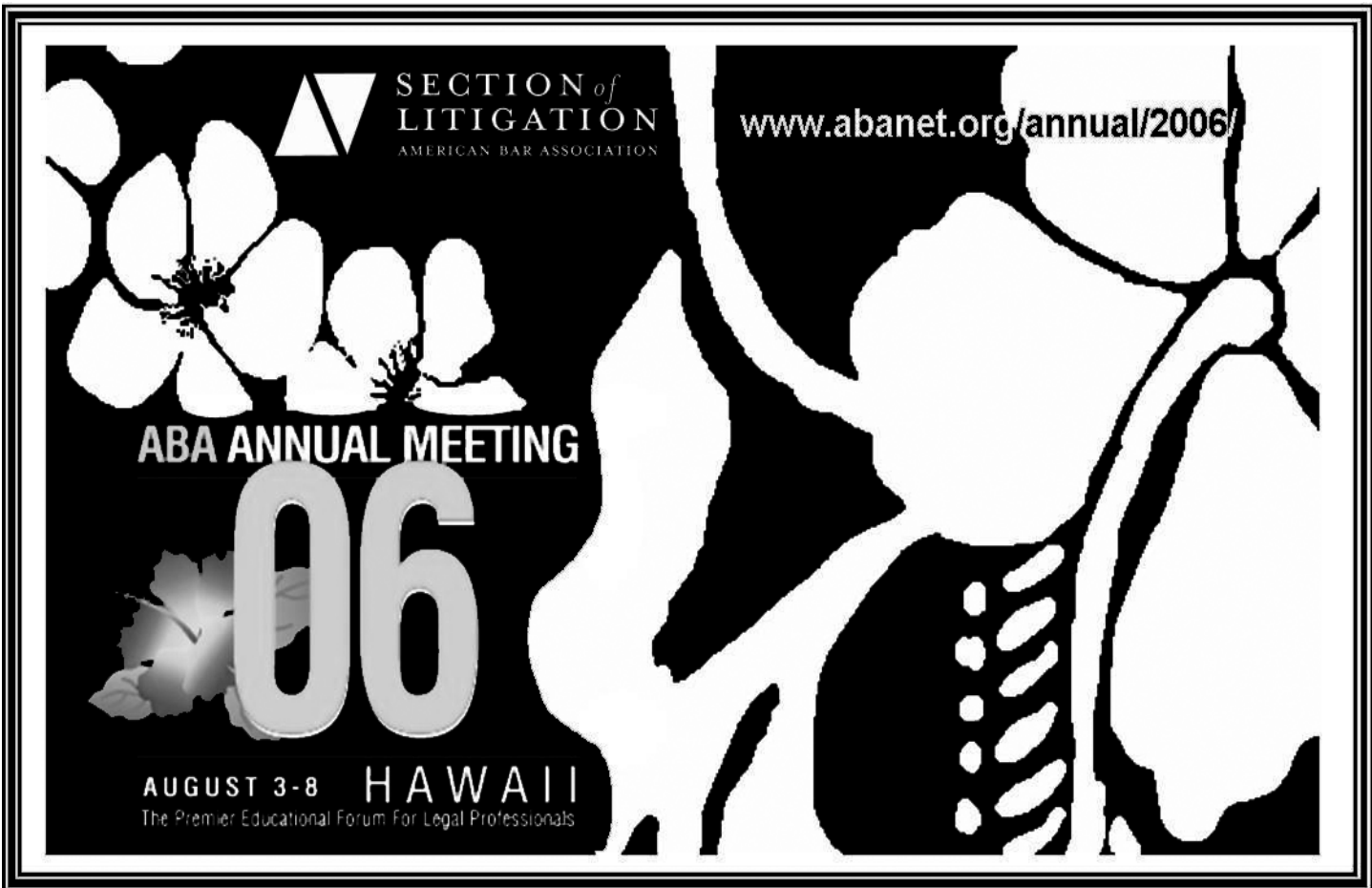
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