

Panel: Special Ethics Concerns in Class Action Litigation

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Protecting Consumer Interests in Class Actions

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I. THE ROLE OF THE EXPERT IN LITIGATION

A. Expert Defined

1. "A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder."¹

B. Federal Rules of Evidence, Rule 702

1. "[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."²

C. Dual Roles

1. "In the role of the expert witness, a forensic economist is a neutral and objective agent of the court, no matter which party called the expert."³
2. In the consultant's role, an economist aids the attorney with all aspects of the case including:
 - a) analyzing data,
 - b) providing supporting evidence for the case,
 - c) anticipating the opposition's case, and
 - d) selecting a testifying expert.

D. Examples of the Domain of the Economic Expert Witness⁴

1. Negligence Case
 - a) "The expert will not be able to testify that a person disabled in an accident in which the injurer was at fault should be entitled to recover the



present value of any lost future earnings, but will be permitted to testify to the calculation of that present value from information about wage profiles, longevity, inflation, interest rates, risk, discounting and so forth.”

2. Antitrust Case

a) “The expert will not be permitted to testify that antitrust law should not forbid price fixing, but will be permitted to testify that the defendants’ pricing behavior is inconsistent with their having agreed to fix prices or that it had no effect on the average price paid by the plaintiff.”

3. Labor discrimination

a) “The expert will not be permitted to testify about whether the law should prohibit sex discrimination, but will be permitted to testify about potential causes of the difference between men’s and women’s wages that are unrelated to discrimination by a specific employer.”

E. Experts Do Not Have the Same Roles as Attorneys⁵

1. Lawyers as advocates.

a) “[I]t is a lawyer’s job to make the best possible argument in support of her client. A lawyer will often find herself advancing a position in the hope that it will work, without necessarily believing that view is correct.”

2. Expert witnesses provide objective testimony.

a) “As a witness testifying under oath, an expert is not entitled to state a position ‘which does not convince yourself’ in the hope it may convince the judge or jury.”

b) “The entire system of expert testimony rests upon the assumption that expert witnesses are independent of retaining counsel, and that they testify sincerely.”

II. THE NATURE OF ECONOMIC EVIDENCE IN CLASS CERTIFICATION ⁱ

A. With respect to impact and fact of injury, economic experts may:

1. explain how the economic factors of an industry relate to the proposed class definition and its applicability under Rule 23.
 - a) For example, pricing may be determined by a price list for some customers and by the result of individual negotiations for other customers.
2. describe how the alleged behavior of the defendants could have had differential impact on individual consumers.
 - a) For example, an advertising fraud suit in which different advertisements with various misleading claims was shown to customers in different geographical areas.
3. discuss whether members of a proposed class were operating in the same relevant market.
 - a) For example, a class of consumers harmed due to an alleged monopolization claim may be overly broad if it includes consumers who purchased products that do not compete with the alleged monopoly.
4. explain economic factors that can be used to determine whether groups of customers were injured or uninjured by the defendants' actions.
 - a) For example, a group of customers included in price fixing litigation whose products were not actually influenced by the cartel activity.

ⁱ Ultimately, the facts and circumstances of the case will dictate the range and scope of an expert's economic testimony. This list is only meant to illustrate the types of factors on which economists may offer opinions in expert testimony but should not be interpreted as a checklist of necessary analyses or as an exhaustive account of potentially useful analyses.

B. With respect to damages, economic experts may:

1. provide methodologies for the determination and calculation of damages on a class-wide basis,
2. determine whether or not a formulaic approach to damages can be used for all class members, or
3. discuss the assumptions underlying a specific methodology proposed for the calculation of damages.

III. ETHICAL CONSIDERATIONS IN THE CONSUMER CLASS CERTIFICATION CONTEXT

A. Basic Ethical Principles in Economic Testimony

1. “The term ‘professional ethics’ typically refers to the distinct, mandatory responsibilities undertaken by individuals in the course of practicing a trade or calling.”⁶
2. Many associations and organizations have ethical standards for testimony by expert witnesses.
 - a) For example, the American Academy of Economic and Financial Experts lists several principles in its ethical standards for economic experts:⁷
 - (1) Employment
 - (a) “decline involvement in any litigation when asked to take or support a predetermined position.”
 - (2) Honesty and Candor
 - (a) “shall not provide the retaining or opposing attorney or the court with any information...they know to be false or misleading.”
 - (3) Disclosure
 - (a) “state the sources of information and material assumptions leading to their opinions.”

- (4) Neutrality
 - (a) "operate from a position of neutrality."
 - (5) Knowledge
 - (a) "maintain a current knowledge base of the discipline."
 - (6) Responsibility
 - (a) "strive to practice within the boundaries of professional and disciplinary honesty and fairness."
3. Expert witnesses cannot be paid on a contingency basis.

B. In the class certification process, the expert is not required to complete the analysis; the expert must only provide a reasonable method for conducting the analysis.

1. Domestic Air Transportation Antitrust Litigation ⁸
 - a) PROPOSED CLASS
 - (1) "All persons in the United States who, during the period January 1, 1988, to the present, purchased domestic airline passenger tickets from one or more of the defendant airlines for air transportation...to and/or from a defendant's hub."
 - b) CERTIFICATION
 - (1) "It is not necessary that plaintiffs show that ...methods will work with certainty at this time. Rather, plaintiffs' burden is to present the Court with a likely method for determining class damages."
 - c) OUTCOME:
 - (1) Class Certified
 - d) SETTLEMENT DECISION ⁹
 - (1) "The risk to plaintiffs in proceeding through trial is highlighted not only by the complexity of relevant antitrust precedent, but also by the difficulty in proving antitrust injury and damages to the class under the circumstances of the case."

- (2) "...some of the benchmarks [plaintiffs] expected to use to assess damages were problematic."
- (3) "...while plaintiffs claim that a damage calculation is possible, any calculation would be difficult, uncertain, and exceedingly expensive."

C. The economist must determine what information is sufficient to appropriately formulate an opinion.

1. One of the court's mechanisms for ensuring the quality of scientific evidence is provided through Daubert.
 - a) Daubert, et. al v. Merrell Dow Pharmaceuticals, Inc. ¹⁰
 - (1) "Faced with a proffer of expert scientific testimony under Rule 702, the trial judge . . . must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue."
 - (2) "Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and [sic] the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community."

D. Demonstrations of Conflicts Among Class Members

1. Linerboard Antitrust Litigation ¹¹
 - a) "The adequacy of the class representative is dependant on satisfying two factors:
 - (1) "that the plaintiffs' attorney is competent to conduct a class action; and
 - (2) that the class representatives do not have interests antagonistic to the class."

2. From an attorney's perspective, the inclusion of class members with conflicting interests may pose an ethical dilemma in terms of how to best represent the interests of the group:
 - a) The American Bar Association's Model Rules of Professional Conduct, Model Rule 1.7(b) ¹²
 - (1) "[a lawyer] shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client."
3. Economic analysis may provide valuable insight with respect to demonstrating potential conflicts and competing incentives amongst class members.
4. *Bradburn v. 3M* ¹³
 - a) PROPOSED CLASS:
 - (1) "a class of persons...directly purchasing from the Defendant invisible and transparent tape between October 2, 1998 and the present."
 - b) CONFLICT:
 - (1) "Defendant maintains that, in this case, Plaintiff's interests directly conflict with the interests of many of the proposed class members."
 - (2) "The members of proposed class include large-volume traders who, Defendant argues, occupy a significantly different position in the transparent tape market than does Plaintiff."
 - (a) "Among other distinctions, these large-volume retailers purchase significant quantities of 'private label' tape from competitors of 3M."
 - (3) "Thus, Defendant argues that Plaintiff and large-volume retailers compete with each other in the market for transparent tape by selling different products, thereby creating incentives for Plaintiff and large-volume retailers to pursue widely differing strategies in order to maximize their potential recovery in this lawsuit."

c) OUTCOME:

- (1) Class certification motion is denied.

5. Yeager's Fuel v. Pennsylvania Power & Light Co. ¹⁴

a) PROPOSED CLASS

- (1) "Proposed class consist[s] of all persons who had sold retail fuel oil, or who had sold, installed or serviced oil heating equipment in utility's service area, and who were thus injured by utility's alleged unlawful restraint of trade in residential heating fuel and equipment markets."

b) CONFLICTS:

- (1) "First, because each member must prove 'some' lost business, and because the market is limited, the named representative's proof of loss necessarily limits or intrudes upon every other member's ability to prove the same."
- (2) "Second, because the defendant typically will argue that the plaintiff's business loss was attributable to factors independent of the defendant's unlawful conduct, the named representative must show that it, as opposed to other class members, would have secured at least some of the lost business. But in so doing, the named representative impedes an absentee's ability to show causation."
- (3) "Further, the named representative's interest in maximizing its own recovery provides a strong incentive to minimize the recovery of other class members, which may be accomplished by showing that any business lost by other class members, as opposed to itself, was caused by some factor independent of the defendant's anticompetitive conduct."

c) OUTCOME: Motion for class certification is denied.

6. Visa Check/Mastermoney Antitrust Litigation ¹⁵

a) PROPOSED CLASS:

- (1) "Plaintiffs moved to certify a class...consisting of 'all persons and business entities who have accepted Visa and/or Mastercard credit cards and therefore are required to accept Visa and/or MasterMoney debit cards under the challenged tying arrangements, during the fullest period permitted.'"

b) CONFLICT

- (1) "The dissent maintains, however, that the very choice to adopt this expert theory is symptomatic of intractable conflicts within the class, causing certification to run afoul of Rule 23(a)(4)."
- (2) "The dissent divides the class into three groups of merchants, based on the merchants' proportion of debit card sales to credit card sales."
- (3) "The interests of these three groups, according to the dissent, would be fundamentally at odds if the 'package' measure of damages were applied at trial."

c) OUTCOME: Class certification is granted.

- (1) The court proposed the following remedies in the event the conflict issue came to fruition:
 - (a) Bifurcate the liability and damage phases of trial,
 - (b) Decertify the class after the liability phase, or
 - (c) Create subclasses.

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ENDNOTES

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- ⁸ *In re Domestic Air Transportation Antitrust Litigation*, 1991-2 Trade Cases (CCH) ¶ 69,518.
- ⁹ *In re Domestic Air Transportation Antitrust Litigation*, 1993-1 Trade Cases (CCH) ¶ 70,165.
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- ¹¹ *In re Linerboard Antitrust Litigation*, 203 FRD 197 (E.D. Pa. 2001).
- ¹² Miller, Geoffrey. "Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard." New York University Center for Law and Business Research Paper No. 03-16, 2003.
- ¹³ *Bradburn Parent/Teacher Store, Inc. v. 3M (Minnesota Mining and Manufacturing Company)*, 2004 WL 414047 (E.D. Pa. March 1, 2004).
- ¹⁴ *Yeager's Fuel v. Pennsylvania Power & Light Co.* 162 F.R.D. 471 (E.D. Pa. 1995).
- ¹⁵ *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124 (2nd Cir. 2001).