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Economic Consulting



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Special Ethics Concerns in Class Action Litigation

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Marsh & McLennan Companies

How Markets WorkSM



Overview

- The Role of the Expert in Litigation
- The Nature of Economic Evidence in Class Certification
- Ethical Considerations in the Consumer Class Certification Context
 - Basic Ethical Principles for Experts
 - Formulating an Opinion
 - Role of Daubert
- Demonstrations of Conflicts Among Class Members



The Role of the Expert in Litigation

- Expert Defined
 - “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
- Dual Roles
 - Consulting Expert
 - Testifying Expert
- Domain of the Expert Witness
- Experts do not have the same role as attorneys

Source:

¹ Carner, Bryan, ed. *Black's Law Dictionary*, 8th ed. St. Paul: West Publishing Co., 2004.



Economic Evidence in Class Certification

- Relating economic factors to proposed class definition
- Describing how alleged behavior could have had differential impact on individual consumers
- Discussing whether members of a proposed class were operating in the same relevant market
- Explaining economic factors that can be used to determine whether groups of customers were injured or uninjured
- Provide methodologies for the determination and calculation of damages on a class-wide basis



Statement of Ethical Principles

American Academy of Economic and Financial Experts

- Employment
- Honesty and Candor
- Disclosure
- Neutrality
- Knowledge
- Responsibility



Ethical Responsibilities of Expert in Class Certification

- Domestic Air Transportation Antitrust Litigation
 - Class Certification Decision
 - “It is not necessary that the 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.”¹
 - Settlement Decision
 - “The risk to plaintiffs in proceeding ... is highlighted ... by the difficulty in proving antitrust injury and damages to the class under the circumstances of the case.”²
 - Benchmarks problematic
 - Calculation of damages is difficult, uncertain, and exceedingly expensive

Source:

¹ In re Domestic Air Transportation Antitrust Litigation, 1991-2 Trade Cases (CCH) ¶ 69,589.

² In re Domestic Air Transportation Antitrust Litigation, 1993-1 Trade Cases (CCH) ¶ 70,165.



Demonstrations of Class Conflict

- Ethical Dilemma to Attorneys
 - “[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.”¹

- Economic analysis may provide valuable insight with respect to demonstrating potential conflicts and competing incentives amongst class members
 - Bradburn vs. 3M
 - Yeager’s Fuel v. Pennsylvania Power and Light Co.
 - Visa Check/Mastermoney Antitrust Litigation

Source:

¹ 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.



Learn More About NERA

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