Antitrust, Vol. 24, No. 3, Summer 2010.

Reed v. Advocate Health Care: Anatomy of Class Certification Proceedings in a Wage Conspiracy Case

BY ROBERT E. BLOCH AND SCOTT P. PERLMAN

COURTS IN YEARS PAST OFTEN USED a perfunctory approach to class certification in federal antitrust cases, accepting plaintiffs' complaint allegations as true, avoiding merits issues, and deferring to proffers of generalized methodology by plaintiffs' experts.[1] Class certification was virtually automatic in price-fixing cases, especially for commodity products, because courts accepted allegations of conspiracy and a uniformly elevated price as adequate to show predominance of common issues over individual issues as required under Federal Rule of Civil Procedure 23(b)(3).[2] This approach gave plaintiffs a strong incentive to litigate the merits and "may force defendants to settle rather than incur the costs of defending a class action and run the risk of ruinous liability."[3]

The pendulum has shifted, however, and courts now play an active gatekeeper role under Rule 23, subjecting motions for class certification to far greater scrutiny and imposing stricter standards of proof on plaintiffs.[4] Perhaps most significant is the Third Circuit decision in *In re Hydrogen Peroxide Antitrust Litigation*,[5] rejecting any presumption favoring class certification in price-fixing cases, and requiring district courts to (1) determine whether all Rule 23 requirements have been satisfied, and not certify a class based on a mere threshold showing; (2) resolve all factual and legal disputes relevant to certification, even if doing so overlaps with the merits issues, and require the class proponents to prove facts on which they rely by a preponderance of evidence; and (3) resolve all expert disputes bearing on Rule 23 elements, rather than uncritically accepting an expert's opinion supporting class certification.[6]

In *Reed v. Advocate Health Care*,[7] the plaintiffs alleged that a group of Chicago hospitals conspired to suppress wages of registered nurses by exchanging compensation information through surveys and other conduct. The court applied the heightened standard of *Hydrogen Peroxide* and the Seventh Circuit decision in *Szabo*[8] and denied class certification, providing important guidance on the evidence plaintiffs must present to satisfy the rigorous assessment required by *Hydrogen Peroxide* and similar circuit court decisions,[9] in particular on the issue of common impact. The decision shows that courts will and perhaps must consider evidence that overlaps with merits issues, weigh conflicting expert testimony, and even consider *Daubert* challenges to expert evidence and use evidentiary hearings at the class certification stage.

Robert Bloch and Scott Perlman are partners in the Washington, D.C. office of Mayer Brown LLP and practice in the areas of antitrust litigation and counseling. The authors represented defendant NorthShore University HealthSystem in the Reed case.

Background of the *Reed* Case

Reed was one of five cases filed in five different cities (Albany, Chicago, Detroit, Memphis, San Antonio), alleging that major hospitals conspired to suppress RN wages. The plaintiffs in each case alleged that hospitals exchanged information on RN wages through local trade association surveys, third-party surveys, direct surveys among hospitals, or other direct contacts.[10] The *Reed* case was filed in June 2006; the Third Amended Complaint at issue for class certification was filed in February 2007.[11] The parties engaged in general discovery from October 2006 forward, and the plaintiffs moved for class certification in July 2008. Counsel presented four days of oral argument followed by detailed submissions of proposed findings of fact and conclusions of law, and the court denied the class certification motion in September 2009.[12] The case ultimately was dismissed with prejudice pursuant to a settlement with the individual plaintiffs for a de minimis amount.

The plaintiffs alleged that the defendants conspired at least since June 2002 to suppress RN wages by agreeing to exchange detailed, nonpublic information regarding their RN wages, through participation in compensation surveys conducted by the Metropolitan Chicago Healthcare Council (MCHC), and through direct contacts among hospital staff.[13]

The plaintiffs alleged separate Section 1 conspiracy claims under the per se rule and rule of reason, and sought to certify a class of "[a]ll persons employed by any defendant to work in a hospital in the Chicago area as a Staff RN at any time from June 20, 2002 until the present."[14] The plaintiffs defined Staff RNs as "nurses who: (1) are hourly paid Registered Nurses; (2) who provide in-patient care at acute care hospitals in Cook, DuPage, and Lake Counties; and (3) hold positions not requiring an APN [Advance Practice Nursing] certification or other advanced degree."[15]

The parties engaged in extensive discovery, including more than twenty depositions, and defendants produced several million pages of documents and voluminous data on wages and other compensation (e.g., shift differentials for weekend and night work, bonuses, benefits) for each of over 20,000 RNs employed by defendants from 2000 to 2006.[16]

The parties engaged in an extensive expert process, with multiple written declarations and multi-day depositions of the plaintiffs' expert, Dr. Gordon Rausser, and the defendants' principal expert, Dr. Robert Willig.[17] The court conducted a four-day hearing in June and July 2009, with detailed presentations to the court by counsel focused on (1) the evidence and plausibility of the alleged conspiracy, (2) the information and practices each defendant used to set RN wages, (3) relevant market definition and whether defendants collectively had sufficient market power to suppress RN wages in the market, and, most significantly, (4) whether the plaintiffs had presented a reliable methodology for proving class-wide impact with common proof, and a class-wide methodology for proving damages.

The Court's Class Certification Opinion

***Rule 23 Requirements and the* Hydrogen Peroxide *Standard*.** The court noted that Rule 23(a) "allows a member of the class to sue as a representative of the class only if (1) joinder of all members is impractical because the class is so numerous, (2) questions of law or fact are common to the class, (3) the representative's claims are typical of those of the class, and (4) the representative will fairly and adequately protect the interests of the class"[18]; and it had little trouble finding that each of these requirements was satisfied.[19]

Plaintiffs sought class certification under Rule 23(b)(3), "which requires that common questions of law or fact predominate over questions affecting only individual members and that a class action is the best method for fairly and efficiently adjudicating the controversy."[20] These two requirements are known as "predominance" and "superiority." The court stated that, "[w]hen considering these factors, we examine the substantive elements of plaintiffs' claims, the proof necessary for those elements, and the manageability of trial on those issues."[21]

Focusing first on predominance, the court stated that, to prevail on their antitrust claims, plaintiffs would have to prove "(1) a violation of antitrust law (here § 1); (2) individual injury, or impact, caused by that violation; and (3) measurable damages."[22] To obtain class certification, plaintiffs "must show common proof will predominate with respect to each of these elements of their claims."[23] Plaintiffs alleged an anticompetitive exchange of wage information to suppress RN wages, so proof of common impact presumably would have required that plaintiffs show each class member had received lower wages as a result of unlawful information sharing.

The court ruled that the plaintiffs had shown they could prove their conspiracy allegations with common proof, and then turned to the issues of common impact and damages, applying the *Hydrogen Peroxide* standard:

> [I]ndividual injury (also known as antitrust impact) is an element of the cause of action: to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification stage is . . . to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. *Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial*.[24]

The court added: "Whether plaintiffs have offered a reliable method of proving impact (as well as damages) with evidence common to the class is the crux of the parties' dispute on this motion."[25]

Plaintiffs' Theory of Common Impact

The plaintiffs' common impact theory was based on a "three-legged stool": First, plaintiffs contended that, notwithstanding variations in wages among individual RNs, "each Defendant sets Staff RN wages by reference to a fixed pay structure or 'wage grid' that determines base wages by job title, years of experience or tenure. Second, defendants set the level of their pay structures by reference to MCHC survey data." Third, Rausser performed a "multiple regression analysis to confirm that the common impact experienced through a wage suppression facilitated by the MCHC survey data and wage grids would not be overshadowed by individual wage variation."[26]

Rausser asserted the evidence supported defendants' collective market power to suppress RN wages, using a relevant product market of "non-exempt RN patient care labor within the hospital setting [that does] not requir[e] an [Advanced Practice Nurse] certification or other advanced degree,"[27] and a geographic market of Cook, Lake, and DuPage Counties in Illinois. He contended that the defendants had market power based on an aggregate 33.7 percent share of total hospital RN employment, their broad array of services, their status as "Magnet" hospitals as rated by RNs, and the inelastic supply of hospital RN services. Rausser also asserted that MCHC surveys "provided a workable mechanism to implement the conspiracy and to monitor co-conspirators' compliance with the wage setting arrangement."[28]

With respect to defendants' use of wage grids and surveys, Rausser relied on evidence offered by the plaintiffs purporting to show that the defendants consistently used MCHC survey results to set their own RN wages, and that this "systematic" usage had the effect of standardizing base wages for all defendants "in a relatively tight band." Rausser concluded that "[t]he limited variation in defendants' base wages, combined with the systematic way in which defendants relied upon the same information to set those base wages, indicates

that all members of the proposed class would have suffered a common impact," so that if wages were suppressed, each class member would suffer economic loss.[29]

To show that the defendants' conspiratorial conduct suppressed wages, Rausser used an econometric model referred to as a "wedge" analysis. The premise of this analysis is that, in a competitive market, supply should equal demand at the equilibrium market price, but if the market was subjected to a buyer-side conspiracy that suppressed wages below market levels, a gap or "wedge" would result, such that RN services demanded by hospitals would exceed the quantity supplied by RNs. As the court observed: "[T]he purpose of the wedge analysis is to create a model for what a competitive average wage would be and compare it to what is actually being paid."[30]

Rausser proposed four methods to compute damages using common evidence. The court focused only on the wedge analysis and disregarded the others because "plaintiffs [] failed to develop any argument those methods would be adequate to calculate damages on a class-wide basis."[31] Before applying these methods, Rausser needed to filter out significant variations in wages among individual RNs, even those of similar ages who worked for the same defendant, due to factors unrelated to the defendants' alleged conspiracy conduct, such as age, tenure, full-time versus part-time status, job title, unit of care, and location.[32] Rausser offered several versions of a "precursor regression" for this purpose,[33] including one that controlled for 51 to 97 percent of wage variation for nonregistry RNs.[34] From this, Rausser concluded that "wages at any given hospital have strong ties to MCHC reported wages for all other defendant hospitals," and offered the regression results as support for the plaintiffs' allegation that the defendants' use of MCHC surveys to set RN wages resulted in common impact on class members.[35]

Defendants' Rebuttal to Common Impact Theory

Willig found no support in economic literature for using a wedge analysis to calculate wage suppression, and criticized Rausser's wedge analysis for using average wage data that masked whether individual RNs suffered wage suppression or the amount of wage suppression.[36] Willig also identified inconsistencies in Rausser's data that created the appearance of a wedge effect. To perform the wedge analysis, Rausser had to estimate both supply and demand curves for RN services, but Willig pointed out that Rausser used different data sets for each curve—defendants' business records to estimate the supply curve, and national survey data to estimate the demand curve—and did not define "full-time" nurses consistently across these data sets. Willig concluded that, "[b]y including more nurses who work more hours in the demand data as compared to the supply data, Professor Rausser artificially inflate[d] his estimate of demand relative to supply, thus creating a 'wedge.'"[37]

Willig criticized Rausser's precursor regression due to the "wide range in the amount of explained variation [51 to 97 percent] captured by" Rausser's regressions,[38] and submitted evidence that relationships suggested in the regression results between each defendant's RN wages and RN wages that other defendants reported to MCHC likely were explained by the passage of time and did not show common impact.[39] Willig also faulted Rausser's damages methodology on the basis that it could estimate only average damages and not damages suffered by each class member, and because Rausser did not make clear how the precursor regression results would be used to estimate damages for individual RNs.[40]

Court's Analysis of Expert Evidence

The court ruled that the plaintiffs "failed to meet their burden of establishing that common proof concerning the fact of injury will predominate,"[41] relying on *Hydrogen Peroxide* to reject the plaintiffs' position that the "battle of experts" is for the jury: "Weighing conflicting expert testimony at the certification stage is not only permissible, it may be integral to the rigorous analysis Rule 23 demands."[42]

Common Impact Theory. The court found sufficient evidence at the class certification stage to support the relevant market definition on which Rausser based his data and regression analysis and to show the defendants' collective market power.[43] The court criticized the plaintiffs, however, for not clearly explaining how the wedge and regression analyses related to each other and how they would be used to show common impact and damages, noting that at one point the plaintiffs offered the wedge analysis to show common impact and the precursor regressions to show class-wide damages, but, at other times, asserted the converse.[44]

The court rejected the plaintiffs' argument that they could show common impact based on evidence that each defendant maintained wage grids and set their wages using MCHC data: "Dr. Rausser makes an unsupported leap in citing 'the systematic way in which defendants relied upon the same information to set those base wages' as support for his finding of common impact."[45] The court noted significant variation in the rates of change in the defendants' RN wages, "both within and across the defendant hospitals," and found no evidence that "defendants actually used the MCHC data in any uniform way, which is a critical showing for common impact."[46] The court also found that the plaintiffs failed to show

> how Dr. Rausser's regression analysis functions as a piece of their showing of common impact . . . . Essentially, plaintiffs have made a superficial presentation that comes close to asking us to take Dr. Rausser's analysis on faith. But we cannot simply take his calculations on faith; Rule 23 requires us to conduct a 'rigorous analysis."[47]

Testing Economic Models to Show Common Impact. The court rejected the plaintiffs' position that, for class certification, they are not required to show that Rausser's analysis actually works, but rather only that it is workable: "We do not find the 'works vs. workable' conception of the issue to be of much utility. The essence of plaintiffs' argument seems

to be that we should not subject Dr. Rausser's models to rigorous analysis, which is simply contrary to the law."[48] The court also stated that where the plaintiffs propose a "novel or complex theory as to injury," the court must conduct an even more searching inquiry into the viability of the theory:[49]

> Plaintiffs have not identified a single case in which their multi-step theory of proving common impact was used in an antitrust case involving labor, let alone found to warrant class certification. The issue is not whether Dr. Rausser has shown just any method for proving impact and damages on a class-wide basis; it is whether the method he proposes is a reliable means of common proof. We have concluded it is not.[50]

Use of Averages in Regression Analysis. The court described as a "fundamental flaw" Rausser's use of average wage data for the wedge analysis: "Measuring average base wage suppression does not indicate whether each putative class member suffered harm from the alleged conspiracy. In other words, it is not a methodology common to the class that can determine impact with respect to each class member."[51] The court also noted that "scatterplots" depicting hourly wages for individual RNs against their age (as a proxy for experience), showed "dramatic variance,"[52] suggesting that use of average wage data could obscure a lack of common impact for some class members.[53] The court concluded that "use of averages, when applied to these facts, unacceptably masks the significant variation in RN base wages,"[54] noting that similar variation prevented class certification in the *Fleischman* case.[55]

Control for Variations in Wage Data. The court criticized Rausser's multiple regression results, noting that, for different defendants or hospitals, the analysis controlled for widely different percentages of variation in wage data (51 to 97 percent), and rejected plaintiffs' characterization of these results as "robust" ("We think not.").[56] The plaintiffs argued that Rausser used an accepted econometric technique, but the court noted that "[m]ultiple regression analysis is not a magic formula,"[57] and concluded that "Dr. Rausser's regression is plainly too imprecise to avoid the need for individualized hearings on impact and damages."[58] The court also criticized the plaintiffs for failing to offer a method to show common impact and damages for registry nurses, who made up 20 percent of the putative class, despite plaintiffs acknowledging that their wages were set differently from RN nurses who worked regularly scheduled hours.[59]

Daubert *Challenge to Expert Evidence on Common Impact.* The defendants filed a *Daubert*[60] motion to exclude Rausser's wedge analysis. *Daubert* requires the court to act as "gatekeeper" to ensure that expert testimony meets the admissibility requirements of Federal Rule of Evidence 702, which provides that an expert may offer an opinion 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." The court found that Rausser's analysis failed to meet the third requirement and was "essentially inadmissible," but denied the motion because, in denying class certification, the court had examined the weight to be accorded to this evidence to the same extent as if the evidence had been admitted.[61]

Method to Prove Class-wide Damages. The court rejected the wedge analysis as a method to calculate damages with common evidence because average wage data used in the analysis failed to account for individual differences in RN compensation relating to factors, such as differences over time, bonuses, and non-wage compensation. The court observed that, even if the wedge method could be used to calculate total damages for the class, "that amount could not be apportioned without reviewing information specific to each nurse."[62] The court found that "the amount of damages suffered by each RN plaintiff will necessitate individualized inquiries, which could mean as many as 19,000 mini-trials."[63] The court rejected the plaintiffs' argument that courts in other cases[64] have certified classes even where individualized damages determinations are required:

> We believe that the instant case falls into the category of cases where the formula by which the plaintiffs propose to calculate individual damages is "clearly inadequate," not to mention that plaintiffs have failed to show that the fact of injury can be proved commonly, and thus class treatment is not suitable.[65]

Implications of *Reed* for Class Certification in Wage Conspiracy Cases

Plaintiffs Must Satisfy a Demanding Standard to Obtain Class Certification. *Hydrogen Peroxide* arguably has done for class certification what *Twombly*[66] and *Iqbal*[67] did for pleading standards and *Daubert* did for expert evidence: mark a fundamental shift in judicial standards requiring district courts to play an active gatekeeper role in antitrust and other class actions. The court's ruling in *Reed* reflects this role for class certification and highlights key tactical considerations for parties in antitrust class actions:

Common Impact Theory Must Be Consistent with and Supported by Record Facts. In *Reed*, the plaintiffs and their expert did not show how they could overcome significant variation in the defendants' wage data. Further, they used average wage data for regression analysis that masked rather than controlled for such variation, and did not offer a method to show common impact for registry nurses, who constituted 20 percent of the proposed class. In addition, the evidence did not show that all defendants set RN wages in a uniform manner based on wage grids and MCHC data.

Given that many factors normally affect how firms set wages and other compensation for individual employees—even where firms in the same industry or market use the same or similar survey data—factual complexities of the type seen in *Reed* may pose substantial obstacles for plaintiffs to show how they can prove common impact in wage conspiracy cases. These difficulties may arise even where plaintiffs

obtain detailed discovery of wage data at the class certification stage.

At a minimum, the plaintiffs and their experts should eschew use of average or aggregate data for modeling and analysis of common impact, as courts in several cases have rejected such evidence.[68] Plaintiffs also must make realistic adjustments to allegations of conspiracy and parallel conduct as case facts develop, especially if the court permits merit discovery at the class certification stage. In some cases, this discovery may undermine conspiracy allegations and evidence of common impact, as occurred in *Reed*.

Components of Common Impact Theory Must Be Plausible and Fit Together. The plaintiffs and their expert in *Reed* did not show how the wedge method and precursor regressions could be combined to prove damages for each class member without individualized proof, or how the regressions supported their theory of impact based on the asserted relationship between wage grids and MCHC data. The court's decision shows that it is critical for plaintiffs to explain how different components of their proposed methodology relate to one another and exactly how the methodology will be used at trial to prove common impact. Plaintiffs who encounter difficulties describing how an initial methodology can be applied to actual case facts to prove common impact should consider whether a different approach is warranted, and perhaps whether the case is suitable for class treatment.

Common Impact and Damage Models Should Have Support in Case Law and Economic Literature. The court expressed concern that the plaintiffs did not cite case law or economic literature to support the use of wedge analysis to prove class-wide impact. At least one other court deciding class certification in a wage conspiracy case has noted the importance of case law support for the methodology proposed by plaintiffs' expert to prove impact.[69] Courts are much more likely to accept a proposed methodology at the class certification stage if other courts have accepted the methodology in similar cases, or at least it has scholarly support.

Clarity Enhances Credibility. The court in *Reed* did not hear live expert testimony, but rather received several detailed written expert declarations, flavored with excerpts of expert deposition testimony and extended presentations by counsel. The court criticized plaintiffs' expert economic evidence as "vague and inscrutable," while "Willig's declarations, on the other hand, are far more detailed and understandable."[70] These statements are a strong admonition that presentation methods influence the weight a court will accord to expert evidence on class certification and suggest important lessons for counsel in antitrust class action proceedings:

- Plaintiffs have the burden of proof on common impact and damages methodology, and must explain clearly and coherently the methodology they submit to show how they can prove these elements with evidence common to the class. Plaintiffs should submit a concise explanation of the economic theory behind the methodology, how the methodology has been or will be applied to evidence in the case to prove common impact at trial, and a summary of economic literature and (hopefully) court decisions to show that the method is recognized in the field of economics and accepted by courts. As the *Reed* court stated, under the rigorous analysis standard for class certification, courts are less likely to take on faith that a vague or poorly explained methodology will be sufficient.
- The plaintiffs' experts should apply proposed economic models using data from the parties and show that data have been used in a consistent manner for all parts of the analysis.
- Economic and other experts must explain complex methodologies and technical results in a manner that is understandable to non-experts. The experts should write in plain, simple language to the greatest extent possible, avoiding unnecessary technical jargon that makes it more difficult for the court to understand the expert analysis.
- As in *Reed*, courts may not accept live expert testimony on class certification, so expert reports or other submissions should be written with a view to how well they will stand up on their own as persuasive evidence, not just as a discovery tool prior to expert depositions. Experts should provide succinct summary points to explain their methodology and results, and relegate factual details and technical explanations to subordinate text.

The Nature of Information Exchanged May Influence the Class Certification Analysis. The ruling in *Reed* shows how the nature of information that defendants exchange may influence how the court views the plausibility of conspiracy allegations and the effect of these perceptions on class certification. The plaintiffs were not able to show that the defendants used standard MCHC surveys in the same way, and did not account for evidence that the defendants rarely requested or used specialized MCHC survey reports and that some defendants used surveys from other sources. Such facts may undercut the plausibility of conspiracy allegations, but also, as in *Reed*, may undermine the methodology that plaintiffs offer to prove common impact.

In a wage conspiracy case based on exchanges of employee compensation information, the plaintiffs should show a clear causal connection between the information exchanged and the alleged reduction in wages, including, when possible, direct evidence that information exchanged among defendants actually was used in a similar fashion by each defendant as a basis for limiting wages or wage increases.

Class Certification Is Difficult to Obtain in Wage Conspiracy Cases. The *Reed* decision is consistent with a developing body of case law rejecting class certification with respect to allegations of a Section 1 wage conspiracy. Prior wage conspiracy cases, including *In re Compensation of Managerial, Professional & Technical Employees Antitrust Litigation*,[71] *Weisfeld v. Sun Chemical Corp.*,[72] and the *Fleischman* RN wage case in Albany, all rejected class certification based largely on the great variety of employee characteristics that

influence wages and variation in wages and other compensation paid to employees. This variation is a major obstacle to plaintiffs claiming they can prove impact on a class-wide basis with common proof, and suggests that class certification in wage conspiracy cases is unlikely.[73]

The *Reed* decision, in particular, suggests how evidence regarding parallel conduct may undercut or support the plausibility of conspiracy allegations and, in turn how the parties may present evidence of common impact on class certification. Specifically, *Reed* indicates that in wage conspiracy cases, variations in compensation among purported class members may provide persuasive evidence refuting allegations of parallel conduct. Alternatively, to show that alleged parallel conduct resulted in common impact, plaintiffs must demonstrate that these variations are unrelated to defendants' alleged joint conduct and that such variations can be filtered out or isolated from the alleged impact of the conspiracy, as the plaintiffs' expert tried but ultimately failed to do in *Reed* through his precursor regression.

Daubert *Motion at the Class Certification Stage.* The defendants presented a *Daubert* motion to exclude the plaintiffs' expert declarations, challenging in particular the wedge methodology and data used for this analysis. The court considered the motion prior to the class certification hearing but allowed the plaintiffs to use the declarations and deposition testimony at the hearing. The court weighed the parties' expert evidence in denying class certification and, for this reason, denied the *Daubert* motion, but concluded that the plaintiffs' expert analysis was "essentially inadmissible." As this outcome suggests, a *Daubert* motion is a preliminary opportunity for a party to provide a framework to view expert issues on class certification and critique the opposing party's expert evidence, and may influence the weight the court accords to this evidence even if the motion is not granted.[74]

Hearing on Class Certification. The court held a four-day "mini-trial" on class certification that allowed each side to present arguments, show how the arguments related to record evidence, and point out weaknesses in the other side's theories. The court did not permit live testimony by witnesses, including experts, but the parties used video excerpts of witness and expert depositions to present testimony. There also was extensive use of record documents and data in the presentations by counsel on each side, including documents relating to the information and factors that influenced each defendant's RN compensation decisions. In addition, the parties made extensive use of trial graphics to present complicated data and summaries of their positions.

This process was unusual in that most courts do not hold an extensive mini-trial on class certification, and a similar process was not used in the two other RN wage cases (Albany and Memphis) in which class certification has been decided. In keeping with the court's expanded gatekeeping role under cases like *Hydrogen Peroxide* and *Reed*, however, the mini-trial procedure ensured a full airing of the relevant issues and represented recognition on the court's part of the pivotal role class certification can play in the resolution of an antitrust conspiracy case. Note, however, that expanded use of this type of procedure may result in courts granting more extensive discovery for class certification purposes to enable the parties to prepare fully for the mini-trial.

Conclusion

The *Reed* case represents another important step in the evolution of class certification law towards courts playing a more meaningful gatekeeper role under Rule 23 by imposing more demanding standards on plaintiffs seeking class certification. This evolution is significant; the class certification ruling is a seminal event in determining whether plaintiffs continue to pursue a case and the leverage they have to extract a large settlement from defendants. The requirements imposed on plaintiffs in such cases as *Hydrogen Peroxide* and *Reed* thus ensure that defendants will not be compelled to incur massive litigation expenses or enter into excessive settlements based on claims that are not suitable for class-wide adjudication. ■

---

1 *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974); *In re* Vitamins Antitrust Litig., 209 F.R.D. 251, 257 (D.D.C. 2002) (citing *Eisen*).

2 *See, e.g.*, Meijer, Inc. v. Warner Chilcott Holdings Co. III Ltd., 246 F.R.D. 293, 307–08 (D.D.C. 2007); *In re Vitamins*, 209 F.R.D. at 258 (and cases cited therein).

3 *See* FED. R. CIV. P. 23 advisory committee notes, 1998 Amendments.

4 *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 593–94 (9th Cir. 2010) (requiring courts to perform a "rigorous analysis" to ensure Rule 23 prerequisites are met, including looking beyond the pleadings to issues that overlap with the merits when necessary); *In re* New Motor Vehicle Canadian Exp. Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008) (requiring searching inquiry, particularly for novel or complex theory of injury); *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 41–42 (2d Cir. 2006) (court should resolve factual disputes with respect to each Rule 23 requirement, including those that overlap with merits); Blades v. Monsanto Co., 400 F.3d 562, 566–67 (8th Cir. 2005) (class certification requires preliminary inquiry beyond the pleadings, including resolving disputed facts that may overlap with merits); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 301 (5th Cir. 2003) (under Rule 23 court should conduct a rigorous analysis and take a close look at the case); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675–76 (7th Cir. 2001) (under Rule 23 court should resolve factual disputes relevant to class determination, including those overlapping with merits).

5 552 F.3d 305 (3d Cir. 2008).

6 *Id.* at 316–20, 326.

7 No. 06 C 3337, 2009 WL 3146999 (N.D. Ill. Sept. 28, 2009).

8 *Szabo*, 249 F.3d. 672.

9 *See supra* note 4.

10 The other cases were *Fleischman v. Albany Medical Center*, No. 06-CV-0765 (N.D.N.Y. filed June 20, 2006) (alleging defendants in Albany exchanged RN wage information through Iroquois Healthcare Association surveys); *Cason-Merendo v. Detroit Medical Center*, No. 2:06-cv-15601 (E.D. Mich. filed Dec. 15, 2006) (alleging defendants in Detroit exchanged RN wage information through surveying each other, retaining third parties to conduct surveys, and Michigan Health and Hospital Association salary surveys); *Clarke v. Baptist Memorial Healthcare Corp.*, No. 06-2377 (W.D. Tenn. filed June 20, 2006) (alleging Memphis hospitals surveyed each other); and *Maderazo v. VHS San Antonio Partners, L.P.*, No. 5:2006-CV-00535-OG (W.D. Tex. filed June 20, 2006) (alleging defendants in San Antonio exchanged RN wage information by purchasing third-party surveys). Class certification was

denied, at least in part, in *Fleischman* and *Clarke* before the *Reed* court denied class certification. *Fleischman*, No. 06-CV-0765 (N.D.N.Y. July 28, 2008) (decision and order certifying class with respect to issues of conspiracy and antitrust injury but denying class certification with respect to "injury-in-fact," or impact, and damages); *Clarke*, No. 06-2377 (W.D. Tenn. Sept. 4, 2009) (order denying plaintiffs' motion for class certification and appointment of class counsel based on named plaintiffs not being adequate class representatives). The court in *Fleischman* rejected the plaintiffs' second attempt to obtain class certification, No. 06-CV-0765 (N.D.N.Y. Feb. 16, 2010) (decision and order) and the court in *Clarke* denied a motion to intervene to substitute a new named plaintiff and new expert as a means to revive the class motion, No. 06-2377 (W.D. Tenn. Dec. 30, 2009) (order denying motion to intervene). As of May 2010, class certification remained pending in *Cason-Merendo* (Detroit) and *Maderazo* (San Antonio).

[11] The defendants were Advocate Health Care, NorthShore University HealthSystem (formerly Evanston Northwestern Healthcare), Children's Memorial Hospital, Resurrection Health Care, and The University of Chicago Hospitals (UCH), which collectively operated twenty-two hospitals in the Chicago area. Two other related defendants, Michael Reese Medical Center Corp. and Doctors Community Healthcare Corp., settled early before going into bankruptcy and were voluntarily dismissed from the case.

[12] *Reed*, 2009 WL 3146999, at *2 n.3.

[13] The MCHC provided four different types of compensation surveys that included nurse wage information. The Compensation Survey for Professional, Technical, Service and Clerical Positions (PTSC) was published twice each year and covered over 125 job classifications. Typically, more than 70 hospitals participated. The "Hot Jobs" Survey also came out twice each year and included 15 "in-demand" positions, including staff RNs. More than 60 health care providers typically participated. MCHC also offered members more customized surveys, including "custom cuts" of the PTSC and Hot Job Surveys and specially commissioned surveys, in which a member could request a survey limited to certain comparator hospitals. The data in all of these surveys was reported on a blinded or aggregated basis so that individual survey participants could not be identified. Hearing Transcript for July 14, 2010, *Reed*, 2009 WL 3146999, on file with authors.

[14] Plaintiffs' Motion for Class Certification at 1, *quoted in Reed*, 2009 WL 3146999, at *1.

[15] Plaintiffs' Updated Proposed Findings of Fact and Conclusions of Law ¶ 5 n.2, *quoted in Reed*, 2009 WL 3146999, at 1* n.1.

[16] Discovery was not bifurcated or limited in scope, and both the plaintiffs and the defendants requested and obtained documents, data, and other discovery pertinent to both merits and class certification issues.

[17] Both experts are tenured professors in economics at leading universities. *Reed*, 2009 WL 3146999, at *6.

[18] *Id.* at *1.

[19] On (1) ("numerosity"), the class contained approximately 19,000 members and defendants did not dispute numerosity. On (2) ("commonality"), the allegation of conspiracy satisfied the commonality requirement, which defendants also did not dispute. On (3) ("typicality"), defendants contended that named plaintiffs Reed and Cindy Digiannantonio were not typical because they did not remain in a Staff RN position during the entire Class Period and their geographic markets differed from the three-county market (Cook, Lake, and DuPage Counties, Illinois) alleged by plaintiffs. The court disagreed, however, finding that their claims arose from the same course of conduct and legal theory as those of the other class members, which was sufficient to find typicality. The court also rejected the argument that the named plaintiffs' claims were not typical of the claims of UCH RNs because, unlike the named plaintiffs, UCH's RNs were union members whose wages were determined by collective bargaining. Finally, on (4) ("adequacy"), the court found the named plaintiffs to be adequate class representatives who had hired qualified counsel and had sufficient interest in the outcome of the case. *Id*. at *2–*4.

[20] *Id.* at *1.

[21] *Id.* at *4.

[22] *Id.* at *5 (citing *Hydrogen Peroxide*, 552 F.3d at 311; Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007)).

[23] *Id.* (citing Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 141 (D.N.J. 2002)).

[24] *Id.* at *5–*6 (*quoting Hydrogen Peroxide*, 552 F.3d at 311-12 (emphasis added)).

[25] *Id.* at *6 (emphasis added).

[26] Plaintiffs' Final Proposed Findings of Fact and Conclusions of Law ¶ 32, *quoted in Reed*, 2009 WL 3146999, at *6–*7.

[27] Rausser Supplemental Declaration ¶ 29, *quoted in Reed*, 2009 WL 3146999, at *7.

[28] *Id.* ¶ 12, *quoted in Reed*, 2009 WL 3146999, at *7.

[29] *Id.* ¶¶ 99, 102, *quoted in Reed*, 2009 WL 3146999, at *8–*9.

[30] *Reed*, 2009 WL 3146999, at *8 (quoting Declaration of Robert D. Willig ¶ 141).

[31] *Id.* at *9. Rausser's second proposed method for estimating damages was to use so-called nonconspiracy cities as a benchmark; the third method was to "compare base wages in Chicago during an unspecified period of time unaffected by the conspiracy with base wages during the period" of the alleged conspiracy; and the fourth method was the "New Empirical Industrial Organization" or "NEIO" approach, which Rausser outlined only in the abstract. *Id.*

[32] *Id.* at *10.

[33] This analysis was referred to as a "precursor regression" based on the fact that, as a precursor to application of any of Rausser's proposed damages methodologies, he needed to filter out individual influences on RN wages other than the alleged conspiracy. *See id.* at *10.

[34] Registry nurses were nurses who were employed by a hospital but did not work regularly scheduled hours. Rather, they were available to come in on an as-needed basis. Nonregistry nurses were nurse employees who worked on a regularly scheduled basis. Registry nurses made up approximately 20 percent of the putative class in *Reed*. *Id.* at *19.

[35] Rausser Supplemental Declaration ¶ 125, *quoted in Reed*, 2009 WL 3146999, at *10.

[36] Willig Declaration in Support of Motion to Strike ¶ 11, *quoted in Reed*, 2009 WL 3146999, at *11.

[37] *Id.* ¶¶ 44–45, *quoted in Reed*, 2009 WL 3146999, at *11–*12.

[38] Sur-Rebuttal Declaration of Robert D. Willig ¶ 6, *quoted in Reed*, 2009 WL 3146999, at *12.

[39] *Id.* ¶¶ 7–8, *quoted in Reed*, 2009 WL 3146999, at *12 ("One would expect in any market of rising wages (including non-collusive competitive markets) that as wages increase with time, surveys reporting the wages would reveal that wages are rising. That does not mean surveys facilitate collusion, but rather that they reflect the trend of wages rising over time.").

[40] *Id.* ¶ 50, *quoted in Reed*, 2009 WL 3146999, at *13.

[41] *Reed*, 2009 WL 346999, at *21.

[42] *Id.* at *20 (citing *Hydrogen Peroxide*, 552 F.3d at 323).

[43] *Id.* at *14–*16. Defendants asserted that the relevant market should include RN positions in nonhospital settings and beyond the three-county market. Both factors would reduce defendants' collective market share in a broader relevant market and require use of broader data sets to perform regression analysis to show common impact.

[44] *Id.* at *13–*14.

[45] *Id.* at *18.

[46] *Id.* The defendants presented evidence that each looked at different information in MCHC surveys, used them in different ways, and considered other, independent information, including other salary surveys. Defendants also showed that they did not make frequent use of special MCHC surveys, in which the number of participants could be limited to as few as five: between 2002 and 2006, of 115 special surveys requested by MCHC members, only seven were requested by a defendant, only one in which two or more other defendants participated, and in none of which all defendants participated. *See* Defendants' Slide C19894-009-0003, *Reed*, 2009 WL 3146999, on file with authors.

[47] *Reed*, 2009 WL 3146999, at *14 (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982); Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 100 F. App'x 296, 299 (5th Cir. 2004)).

[48] *Reed*, 2009 WL 3146999, at *20 (citing *In re* Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 492–93 (N.D. Cal. 2008)). It is notable that plaintiffs' argument on this point was based on the analysis of the court in *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, 256 F.R.D. 82, 85, 100 (D. Conn. 2009). The *Reed* court explicitly rejected the EPDM standard, but without actually referring to the case.

[49] *Reed*, 2009 WL 3146999, at *20 (citing *New Motor Vehicle Canadian Export*, 522 F.3d at 26).

[50] *Id.*

[51] *Id.* at *16–*17 (citing Blades v. Monsanto Co., 400 F.3d 562, 573 (8th Cir. 2005); *Graphics Processing*, 253 F.R.D. at 493–97, both of which rejected evidence based on averages as insufficient to support common impact).

[52] For example, a scatterplot for one defendant for the fourth quarter of 2004 featured data for which the mean wage was $29.55, but for which several hourly wages were as low as $21 or $22, while others were $40 or more, with many scattered in between, even for RNs of the same age. *Reed*, 2009 WL 3146999, at *17.

[53] The defendants submitted evidence that data on annual wage increases showed that (1) some RNs received raises of more than 15 percent while others received none, (2) average percentage increases varied greatly among hospitals, and (3) changes in defendants' average base wages did not move in parallel, but rather changed at different rates and at different times. *Id. See also* Defendants' Slides C19892-014-0001 and C19892-016-0001, *Reed*, 2009 WL 3146999, on file with authors.

[54] *Reed*, 2009 WL 3146999, at *18.

[55] *Id.* (citing *Fleischman*, No. 06-CV-0765, 2008 WL 2945993, at *6 (N.D.N.Y. July 28, 2009) (decision and order on class certification, holding that plaintiffs failed to show impact was amenable to common proof and noting: "Interchangeability and job mobility in the nursing profession, and the reasons affecting the wage of a particular nurse or class of nurses, though contested, involve too many variables and provide too much ambiguity to carry a motion for class certification on the issue of injury-in-fact.")).

[56] *Id.* at *19.

[57] *Id.* (quoting *Piggly Wiggly*, 100 F. App'x at 299).

[58] *Id.*

[59] *Id.* Defendants submitted a scatterplot showing that Rausser's regression explained only 5 to 30 percent of wage variation for registry RNs, with errors for some of more than $10/hour. *Id.*

[60] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[61] *Reed*, 2009 WL 3146999, at *21.

[62] Defendants' Proposed Findings of Fact and Conclusions of Law § 2, ¶ 40, *quoted in Reed*, 2009 WL 3146999, at *21.

[63] *Id.*

[64] *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977); *Bell Atlantic*, 339 F.3d at 306–07, and cases and authorities cited therein.

[65] *Reed*, 2009 WL 3146999, at *22 (citing *Bell Atlantic*, 339 F.3d at 307, and cases cited therein; Rodney v. Northwest Airlines, Inc., 146 F. App'x 783, 791 (6th Cir. 2005); Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 215 F.R.D. 523, 531 (E.D. Tex. 2003)). For reasons similar to those on which the court based its conclusions regarding impact and damages, the court also found that the plaintiffs failed to satisfy Rule 23(b)(3)'s "superiority" requirement. *Id.* at *22–*23.

[66] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[67] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[68] *See Blades*, 400 F.3d at 573; *Graphics Processing*, 253 F.R.D. at 493–97.

[69] *See* Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 143 (D.N.J. 2002) (noting that prior court decisions have recognized the validity of the multiple regression and "yardstick" methodologies proposed to prove class-wide impact, but finding that plaintiffs failed to provide adequate factual support for these theories).

[70] *Reed*, 2009 WL 3146999, at *14.

[71] 2003 U.S. Dist. LEXIS 22836 (D.N.J. 2003).

[72] 210 F.R.D. 136 (D.N.J. 2002).

[73] In *Johnson v. Arizona Hospital & Healthcare Ass'n*, No. CV 07-1292-PHX-SRB, 2009 WL 5031334 (D. Ariz. 2009), plaintiff nurses claimed that a hospital association that ran a registry program conspired with member hospitals to suppress wages for temporary nurses. Plaintiffs sought certification of a class that included both traveling and per diem nurses. The court denied certification of a class of traveling nurses (i.e., nurses under short-term contracts with the hospitals), whose wages were said to vary greatly, in part because they often negotiated compensation on a nurse-by-nurse basis. The court did certify a class of per diem nurses, who were employed and paid by agencies that provide temporary nursing services to hospitals, because their compensation was more predictable and less varied than that of traveling nurses. The certification of a class of per diem nurses in *Johnson* may be explained by the fact that a single trade association set uniform bill rates that its hospital members paid to agencies that employed the nurses, and there was evidence that these uniform bill rates correlated with compensation the nurses actually received. 2009 WL 50313334, at *9.

[74] *See also* Am. Honda Motor Co. v. Richard Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) (holding that when expert's report or testimony is critical to class certification, district court must rule on *Daubert* motion).