The Dow Chemical Polyurethane Decision and US Class Action Trends

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I. Introduction

On November 7th 2014, the 10th Circuit affirmed a $1.06 billion jury verdict in a class action accusing Dow of fixing polyurethane prices.¹ This was one of the largest verdicts issued in the US during 2014. On March 9, 2015 Dow asked the U.S. Supreme Court to review the 10th Circuit’s decision.

The case started in 2005 with allegations that Dow agreed with BASF SE (BASF), Huntsman International LLC and Lyondell Chemical Co. to fix prices and allocate customers and markets in violation of Section 1 of the Sherman Act. The urethane based products spanned multiple industries, including the automotive, construction, and furniture industries. All the other Defendants, except for Dow, settled.

The district court certified a plaintiff class including all industrial purchasers of polyurethane products during the alleged conspiracy period. The jury found that Dow had conspired to coordinate lockstep price increase announcements and agreed to implement these increases in individual contract negotiations from 2000 to 2003.² The jury awarded plaintiffs $400 million which was then trebled to $1.06 billion. Dow made multiple unsuccessful attempts to decertify the class. Upon appeal the 10th Circuit affirmed both the class certification and the jury’s verdict.

Dow argued four points on appeal: 1) class certification was improper; 2) the plaintiff’s expert testimony should have been excluded; 3) there was insufficient evidence regarding liability; and 4) the damages award violated the 7th Amendment.³

The main focus of this article is Dow’s class certification argument and how it relates to class action and certification trends over the last few years.

II. Class Action Trends

In 1974, the Supreme Court’s decision in Eisen v. Carlisle & Jacquelin stated that no preliminary inquiry on the merits of a case was needed in order to certify a class of plaintiffs. The 1982 decision in General Telephone Company v. Falcon was directly at odds with Eisen and its comparatively loose requirements.⁴ In Falcon, the Supreme Court stated that a court needed to

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¹ Aaron Vehling, 10th Cir. Won’t Rehear Dow $1B Urethane Antitrust Appeal, Law360 (Nov. 07, 2014 4:02PM) available at http://www.law360.com/articles/594535/10th-circ-won-t-rehear-dow-1b-urethane-antitrust-appeal.
³ In re Urethane Antitrust Litigation, No. 13-3215 (10th Circuit opinion filed Sep. 29, 2014)
employ a rigorous analysis to determine if the prerequisites for class certification in the Federal Rules of Civil Procedure (FRCP) were satisfied.

These Supreme Court decisions were directly at odds and resulted in split results across the Circuits. The 4th, 5th and 11th Circuits tended to follow the more rigorous analysis required in *Falcon*, rejecting the broad presumption for class certification. Most courts, at the time, however, followed *Eisen*’s looser requirement and presumption in favor of class certification.

The 3rd Circuit officially codified the presumption in *Eisen* in *Bogosian v. Gulf Oil Corp.* (1977). The “Bogosian Shortcut”5 required little more than a superficial showing or a vague promise that plaintiffs suffered some damage in order for class certification to be granted. As a result of this “short cut” courts essentially gave little or no consideration to conflicting merits based issues or expert testimony when ruling on class certification.

Over time courts began to raise the bar for evaluating class certification and more courts shifted away from *Eisen*’s and closer to *Falcon*’s standards. In 2008, the 3rd Circuit in *Hydrogen Peroxide* rejected the Bogosian Shortcut and clarified the stricter requirements for class certification. Merely a threshold showing by a party was no longer enough.

*Hydrogen Peroxide* held that the trial court needed to make all factual and legal inquiries necessary, it had to consider all relevant evidence and arguments (including expert testimony) presented by the parties in order to determine class certification.6 Factual determinations had to be supported by a preponderance of the evidence and all factual or legal disputes relevant to class certification, even if they touched on the merits, would need to be resolved.7 This, however, only represented the beginning of the shift to a more rigorous analysis of class certification issues.

*Walmart Stores, Inc. v. Dukes*, a 2011 Supreme Court decision, resolved the dichotomy between *Eisen* and *Falcon*, and established a rigorous analysis as the appropriate standard of review for class certification.8 Any uncertainty as to the standard of analysis required in class certification disputes was put to rest.

The issue for the courts then became deciding upon the appropriate requirements necessary to fulfill a rigorous analysis standard. This put a much greater focus on “common impact” as a decisive factor in deciding class certification. Questions common to the class should be more important or predominate over individual questions. Generally, these common questions rest on whether plaintiffs can show an actual violation of antitrust laws, an injury to the class as a whole stemming from the violation and the amount of damages incurred. Prior to *Hydrogen Peroxide* and *Walmart*, when the presumption toward class certification was prevalent, courts were willing to assume common impact in antitrust cases that alleged a conspiracy via the “Bogosian

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5 Bogosian v. Gulf Oil Corp. (1977) codified the Third Circuits stance on supporting the presumption in favor of class certification. “If a nationwide conspiracy could be proven, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and he made some purchases at a higher price”. Bogosian v. Gulf Oil Corp., 561 F. 2d 434, 455 (3d. Cir. Pa. 1977); Brian Ellman & Almudena Arcelus, Analysis Group, The Evolving Standards for Class Certification in Antitrust Cases.


7 Id.

8 Robert Abrams et al., Rigorous Analysis: Recent Developments in Antitrust Class Action Litigation in the United States, Baker Hostetler.
shortcut”.9 Today under the rigorous analysis standard, significantly more weight is given to common questions and expert testimony.

*Comcast Corp. v. Behrend*, a 2013 case, raised the bar on antitrust class actions again. In this case, Plaintiffs put forth four different theories of liability with an expert report citing $875 million in damages. However, the district court held that only one of their theories had class wide effects, but accepted the original damage report. The Supreme Court reversed this decision 5-4. The Court held that plaintiffs were required to show, during the class certification phase, not only that damages were possible, but that they were tied to the theory of liability being argued.10

### III. Dow’s Class Decertification Argument and Why it Failed

Contrary to these general class action trends, the Dow decision confirms that rumors of the death of class actions are premature. The plaintiffs, despite court trends raising the bar for class certification, managed an impressive verdict based on detailed plaintiff side expert testimony.

Dow argued that class certification in their case was improper because common questions did not predominate over individualized ones. The district court rejected this argument finding that common questions predominated because: 1) “the existence of a conspiracy and impact raised common questions capable of class wide proof” and 2) “these common liability- related questions predominated over individualized questions regarding the extent of each class member’s damages.”11

Dow maintained that the district court’s ruling was contrary to the decisions in *Wal-Mart Stores v. Dukes* and *Comcast Corp. v. Behrend*. *Walmart* was a gender discrimination claim under Title VII. The female plaintiffs alleged that their supervisors discriminated against them in decisions on pay and promotions. While the 9th circuit supported the certification of a class of female employees, on appeal the Supreme Court reversed. The Court found no companywide policy of discrimination or a common mode of exercising discrimination through the company.12 The Court further stated that it was not common questions alone that were needed but the “capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation.”13 In *Walmart*’s case plaintiffs could not show a common answer for the question of pay and promotion disparities and therefore needed to file individual suits.14 Plaintiffs could not base their class wide liability theories on just a sample of class members, known as a trial by formula. A theory of liability needed to apply to the whole class, otherwise *Walmart*’s right to defend itself against individual claims would be violated.15

Dow argued that the jury verdict was improper under *Walmart* because: 1) Dow was being denied their right to defend themselves in individual proceedings and show that individual members did not suffer harm and 2) it allowed the class to proceed on the basis of extrapolated impact and damages rather than actual damages.

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9 Id.
11 Dow Chem. Co. v. Seegott Holdings Inc. (10th Cir. 2014).
12 Id at 12.
14 Id.
15 Id.
In order to prevail, Dow needed to show that the district court abused its discretion in finding that class wide issues relating to the existence of a conspiracy and its impact predominated. In the 10th Circuit’s analysis, the price fixing affected all market participants, creating an inference of class wide impact even if the prices were at some point individually negotiated. This view was supported because there was evidence that the conspiracy artificially inflated the baseline for price negotiations. At trial, Dow’s own witnesses acknowledged that price announcements they released had affected the starting prices for price negotiations. Nothing in Walmart therefore suggests that the district court abused its discretion in this case, nor did they violate Dow’s right to defend itself.

In Dow an extrapolated model was used to outline the impact and damages for the class. However, there is a clear distinction between the use of expert models in Dow and Walmart. Walmart held that liability cannot be proved by relying on information from a sample of the overall class. Much like class certification rests on having common questions predominate over individual questions and the existence of common answers to drive the litigation, there must also be a common source of common evidence to establish this answer. In Dow, the plaintiff’s extrapolated model was used purely to approximate the damages felt by the class as a whole and not to establish Dow’s liability as to each individual class member. Walmart in no way prohibits the use of this type of model to calculate damages. Further, while Dow raised other complaints against the model used, it made no attempts to explain how the model resulted in either an abuse of discretion or caused individualized questions to predominate, therefore these issues could not be examined on appeal by the 10th Circuit.

Dow then relied on Comcast to try and complete their argument that the model employed to extrapolate and prove class wide damages were inappropriate. Comcast could not control because the procedural setting, in comparison to Dow was very different. The court was expected to determine before trial, whether plaintiffs could prove class wide damages and the only evidence used was one expert report and its flawed model. In contrast, Dow raised this argument after the trial’s conclusion.

The decision in Comcast was based on the majority’s conclusion that without a way to measure class-wide damages appropriately, individual questions would “overwhelm questions common to the class”. Plaintiffs in Dow, unlike in Comcast, did not concede that class certification required a common methodology to prove class wide damages. During the course of the trial the Dow court was given a greater opportunity than the court in Comcast to find a “fit” between the plaintiff’s theory of liability and the theory of class wide damages. Without the evidence and expert testimony that comes with a full trial, this “fit” between liability and damage could not be found in Comcast, thus common questions could not prevail over individual questions.

IV. Conclusion: What does this all mean?

The presumption in favor of class certification is a thing of the past. As court cases continue to evolve and trends show that the bar for class certification is rising, there may be the concern that

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16 Dow v. Seegott at 13; In re Linerboard Antitrust Litig., 305 F.3d 145, 151-52 (3d Cir. 2002).
17 Dow v. Seegott; See Also Leyva v. Medline., Inc., 716 F.3d 510, 514 (9th Cir. 2013).
18 Dow v. Seegott at 19; See Also Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992).
this is leading to a presumption **against** class certification. If there is one thing that Dow proves, particularly when compared against cases like *Comcast* and *Walmart*, is that at least for now, this is an unexaggerated concern. While the standard of review has risen to a rigorous analysis, the Circuits are in the process of outlining the particular elements in a case companies and their attorneys should pay particular attention to.

Going forward, attorneys litigating antitrust class actions must be methodical in their approach. If a complaint is made, a mere threshold showing is no longer enough to be persuasive for either plaintiffs or defendants. Plaintiffs should not make vague assurances that they have been suffered damages, they must show convincing evidence. In turn, Defendants must prove up their arguments and offer their own expert testimony and evidence. Each side in class action litigation needs to have effective expert testimony if they hope to prevail, and cases often may come down to a “battle of the experts”.

Under the rigorous analysis standard, plaintiffs must show that common questions predominate over individual questions for the class, that there are common answers to these questions, that damages affect the class as a whole, and that the evidence effectively ties the theories of liability and damages presented together. The court must see that these two theories “fit” together.

The courts are still evaluating the extent to which they must resolve factual issues and the merits in order to rule on class certification, increasingly touching on the merits of the case. This is an evolving area of law. Dow filed its petition for certiorari with the Supreme Court on March 9th, 2015, whatever decision the Court comes to will likely have a definitive impact on the future of antitrust class actions.